Supreme Court, U.S.

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No. _____

In The

Supreme Court of the United States

October Term, 1998

ROY G. SPECE, JR. AND ROSE MARIE IBÁÑEZ,

Petitioners,

v.

BAYER CORPORATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do defendants in a collusive, void settlement-only class action assume the risk that, even if the class is invalidated, they will have to compensate claimants (and counsel for those who have obtained representation) with the consideration promised in the Class Notice when defendants represent that all conditions set forth in the Notice have been met and fail fairly to warn claimants that the settlement class might be voided?

2. Do members of a settlement-only class who file written acceptance of the consideration promised to them in a Class Notice disseminated under the aegis of a United States District Court have a right to all such consideration, or must they accept material diminution in such consideration (including explicit disavowal of reliance on the District Court's fairness finding) unilaterally written into releases promulgated and disseminated by the defendants?

3. Is counsel estopped from promptly seeking review of an order abrogating her fee contracts when, many months earlier and preceding both a final fairness hearing and improper settlement implementation conduct by the defendants, she had cautioned the court about, but had not appealed, the issue that the pending mass tort settlement-only class action contained unethical elements that might later be exploited to the detriment of members of the class or their counsel?

LIST OF PARTIES

ROY G. SPECE, JR. and ROSE MARIE IBÁÑEZ, Petitioners.

BAYER CORPORATION; ARMOUR PHARMACEUTICAL CO.; BAXTER HEALTHCARE CORPORATION; RHONE-POULENC, INC.; ALPHA THERAPEUTICS CORPORATION, Respondents.

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CITATION OF LOWER COURT OPINIONS

The district court order in this case, entered on February 18, 1998, in *Walker v. Bayer Corporation*, No. 96-C-5024 (N.D.Ill.), is unreported. It is reproduced in the Appendix of co-petitioners Mull & Mull (11-29).

The decision rendered by the United States Court of Appeals for the Seventh Circuit on October 19, 1998, in this case is reported at 159 F.3d 1016. It is also reproduced in the Mull & Mull Appendix (1-9).

JURISDICTION

The Opinion sought to be reviewed was handed down by the United States Court of Appeals for the Seventh Circuit on October 18, 1998. Petitioners' timely Petition for Rehearing was denied on November 4, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section 2 of the United States Constitution states:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; –

> to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

STATEMENT OF THE CASE

A. Jurisdiction of the District Court.

Plaintiffs in this settlement-only class action below claimed jurisdiction vested in the trial court pursuant to 28 U.S.C. § 1332 in that complete diversity existed between the named class representative (a Florida resident) and the defendants, Rhone-Poulenc Rorer and Armour Pharmaceutical Company (organized, New York; principal place of business, Pennsylvania); Bayer Corporation (organized, Indiana, principal place of business, Indiana); Baxter Healthcare Corporation (organized, Delaware; principal place of business, Illinois); and Alpha Therapeutic Corporation (organized and principal place of business, California).

The trial court had jurisdiction over the MDL, generally, under 28 U.S.C. § 1407.

B. Preliminary Facts.

First, it is fact, and not argument, that this, like most mass tort litigation, cannot be understood without making explicit the pressure for closure despite legitimate objection. What is now before the Court is a highly controversial attempted conclusion to the bulk of a protracted, complex, and embittered litigation. Petitioners are virtually the last bastion of resistance. Second, it should also be observed at the outset that these petitioners' (Spece & Ibáñez) appeal below was consolidated, *sua sponte*, with the appeal of Mull & Mull, who are also filing a Petition for Writ of Certiorari herein. Although Spece & Ibáñez will use Mull & Mull's Appendix herein, it must be emphasized that the positions of the two sets of petitioners are different in certain important respects that will be explained below.

C. 1991 to Date.

Petitioners began handling cases for consumers harmed by AIDS-tainted blood products in 1991. By 1993, they were pursuing such cases in both state and federal courts. This mass tort settlement class action arises out of an MDL proceeding involving cases of such consumers pending in the United States District Court for the Northern District of Illinois. One of the MDL cases was *Wadleigh v. Rhone-Poulenc, Inc.*, 157 F.R.D. 410 (1994), a litigation class action filed along with the MDL petition in September of 1993. *Wadleigh* was partially certified on August 17, 1994, and then decertified upon mandamus review by the United States Court of Appeals for the

Seventh Circuit on March 16, 1995, when the defendants (respondents herein and often called "fractionators") argued that a hemophilia/AIDS class action could not meet virtually any Federal Civil Procedure Rule 23 requirements. See *In Re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995), *cert. denied sub nom., Grady v. Rhone-Poulenc Rorer, Inc.*, 576 U.S. 867 (1995) (hereinafter "*Rhone*"). Respondents repeated this "shotgun" attack on hemophilia/AIDS class actions in courts throughout the country both before and after *Wadleigh*.[1] This Court denied plaintiffs' Petition for Writ of Certiorari on October 2, 1995.

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[1] They even argued, and successfully so in Florida, that *Rhone* collaterally estopped consumers of AIDS-tainted blood solids from establishing a class action. They similarly defeated an Arizona state-wide class action filed by Spece & Ibáñez. Speaking of the settlement-only class action at issue here, they also argued, in an amicus curiae brief filed in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) (hereafter *Amchem*), that adoption of the Third Circuit's reasoning would make the action "illegal." (1996 WL 722038, page 3, Appendix Volume II to Mull & Mull's Petition For Writ Of Mandamus, Exhibit "E," to Exhibit/tab "K.") The various decisions were submitted with respondents' Opening Brief below as Circuit Rule 30(b) Appendix, Exhibit "E," pages 56-93. These materials were not supplied as substantive authority, but only as proof of what actually transpired. They are readily verifiable, respondents cannot in good faith dispute them, and they therefore fit within the logic of judicial notice. See McCormick on Evidence § 330, 396-397 (4th ed., 1992) (lamenting that most courts are overly cautious as to such materials). In *Wadleigh* respondents argued that the impediments to such a class action were insurmountable. For example, there were said to be interminable conflicts among groups of persons with hemophilia. See respondents' pleading (App. 129, especially at 155).

On August 13, 1996, respondents executed a settlement agreement, providing for a settlement-only class, with the MDL Plaintiffs' Steering Committee ("PSC," who were also former *Wadleigh* class counsel). Respondents and the PSC asked the trial court to certify a settlement-only class the next day. The court immediately provisionally certified that settlement-only class action, set a fairness hearing date, and approved the Class Notice: *Walker v. Bayer Corporation, et al.*, No. 96-C-5024.[2]

The class settlement agreement provided that each plaintiff "group" or "family" associated with an AIDS-infected consumer would receive $100,000 (regardless of the strength of each case) net of costs, fees, and liens (if the latter could be resolved), gave respondents an option to back out if there were too many opt-outs, and created a separate fund of $40,000,000 for attorney's fees, and administrative, ADR, litigation, and notice costs. Although the agreement provided that all fees would be

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[2] Despite the parties' explicit recognition of the necessity of this step, however, the trial Court has not, to this date, followed up and finally certified the class. The provisional nature of the trial court's August 14, 1996, Minute Order (Record on Appeal (hereinafter "ROA") #14, referring to the Index of Record in Case no. 98-1770, the only index supplied to Spece & Ibáñez, which Index is the separately bound, Circuit Rule 30(b) Appendix filed with their Opening Brief, Exhibit "A," pp. 1-15), is manifest because the class complaint was only filed that day. Moreover, the provisional nature of both the class certification and the August 14, 1996, fairness finding is explicitly recognized in the relevant documents. See, e.g., the August 13, 1996, Factor Concentrate Litigation Settlement Agreement, page 12, Exhibit "6" to the respondents' February 2, 1998 Reply in Support Of Their Motion To Enforce Judgment With Respect To The Cost and Fee Fund, ROA #76.

paid out of the $40 million fund, it was explicitly stated that there would be separate proceedings on attorneys' fees following the fairness hearing. The preliminary fairness order by the court provided for the same subsequent review of attorneys' fees.[3]

When the trial court inquired as to the advisability of a settlement-only class action in the very case where a litigation class had been rejected by the appellate courts, respondents answered that it was the only mechanism through which the court could control attorneys' fees and make the deal work. The settlement-only class action was openly espoused to be for the purpose of absolutely minimizing opt-outs and allowing the trial court to control attorneys' fees. The settlement offer to the PSC was explicitly conditioned on minimizing opt-outs and acceptance of respondents' stipulations as to the maximum amount that could be compensated for attorneys' fees, and administrative, ADR, litigation, and notice costs.[4]

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[3] See the August 13, 1996, Settlement Agreement, pages 37-39, Exhibit "6" to the respondents' February 2, 1998, Reply In Support Of Their Motion To Enforce Judgment With Respect To The Cost and Fee Fund (ROA #76), and Pretrial Order #32, August 14, 1996. (ROA #6 and App. 34).

[4] The conditions are set forth in the August 13, 1996, Settlement Agreement cited to in note 3. They were reiterated at the August 14, 1996, provisional certification and fairness "hearing." See, e.g., Mull & Mull's January 7, 1998, Opposition To Fractionators' Motion To Adjudicate Liens, pages 5 (alluding to attorneys' fees and citing to respondents' counsel's reference to the need for a class action to control attorneys' fees) and 27 (citing to not only cap on opt-outs but provision for payment of attorneys' fees to PSC only regarding advice whether to opt-in or opt-out). (ROA #71.)

This amount was not based on any calculation of the market value of the attorneys' time or their actual contracts with their clients, nor was there any attempt to estimate the administrative, ADR, litigation, and notice costs. All members of the class, regardless of the merits or market value of their cases, were to receive the same compensation.

These petitioners concluded that the settlement could be implemented so as to be in the best interests of their clients. Those who had weaker cases or just wanted closure could accept the $100,000, while those with stronger cases or a desire to litigate could opt-out. Petitioners also realized that conflicts of interest inherent in the history and structure of the settlement could be exploited in the implementation of the agreement so as to make the transaction unfair to both the clients and their attorneys. Therefore, petitioners called the court's attention to such conflicts of interest and indicated they would not press the issue if the settlement was implemented in good faith.

Specifically, on August 13, 1996, petitioners filed their Certain Arizona Plaintiffs' Response To Motion For Preliminary Fairness Finding And Request For Three Business Day Extension To Allow More Complete Response, stating:[5]

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[5] At pages 2 and 3 of *Walker* District Court docket entry #630, added to the record on appeal pursuant to last paragraph of the trial court's March 11, 1998 Order, Appendix to Respondent's Opening Brief, Exhibit "C," pages 19-49. This objection by these petitioners is one of the differences between them and Mull & Mull. Mull & Mull felt they were ethically bound *not* to raise any such objections.

> "[P]laintiffs wish to lodge an objection to the defendants' probably unethical, in effect, stipulation to the amount of costs and fees, thereby potentially driving a wedge between filed and unfiled cases and certain victims and their attorneys. Plaintiffs waive this objection, but note that the proposed settlement can ultimately be found fair only if: (1) all legitimate costs, which by Arizona law must be paid by the clients, are awarded; and (2) the Court assures that the probable burden of inadequate fees is spread evenly among all the attorneys based on certain criteria commonly applied in attorneys' fees adjudications, including the honoring, when possible, of contracts between counsel and clients in state court litigation."

The trial court said nothing about petitioners' objection, and the parties, including petitioners, began implementing the agreement. However, respondents' inappropriate behavior in the implementation of the settlement made it apparent that the transaction was not being carried out in accord with the settlement agreement or the best interests of consumers or their attorneys. Specifically:

1. Through December of 1997 and beyond, respondents inappropriately stated to appellants and other plaintiffs' counsel that their fee petitions would be looked upon most favorably if they opted-in all their clients.[6]

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[6] See App. 81 (transcript); October 22, 1997, Memorandum Of Points And Authorities In Support Of Response To Motion For Enforcement Of Order; Counter Motion For Orders Setting Expedited Hearing, Requiring Payment Of Sanctions, Payment Of Settlement Monies, Payment Of Liens For All Claimants,

2. In August of 1997, respondents distributed release forms to persons who had elected to accept the consideration set forth in the Class Notice. In these releases, respondents (apparently with the acquiescence of the PSC), without notice to or approval by the court, unilaterally diminished the consideration promised in the Class Notice.[7]

Rescinding Clause Or Releases Exonerating Governmental Bodies, And Taking Jurisdiction Of And Allowing Discovery On Plaintiffs' And Their Attorneys' Claims Of Fraud, Interference With Contract, Unjust Enrichment, And Breach Of Contract, page 13 Circuit Rule 30(b) Appendix to petitioners' Opening Brief, Exhibit "F," pages 94-95, item #2 added to the record by the trial court's May 26, 1998, Order, Spece & Ibáñez not having received any ROA #.

[7] Specifically,

a. Liens would be borne by the settling clients to the extent that respondents had been unable to negotiate reductions and releases;

b. The right to file third-party claims against federal and state government entities was abrogated;

c. The Notice states that "if you have filed a lawsuit against some party other than [respondents], acceptance of this Settlement will not bar you from continuing with that lawsuit, but it could, depending upon the state law applicable to your claim, reduce your total recovery in that lawsuit." The Release includes a provision requiring the Releasor to indemnify respondents for any third-party claims against them.

d. The Release reduced the amount that certain claimants might ultimately receive by requiring signatures of persons who, according to the Notice, became ineligible by failing to either opt-in or opt-out.

e. The release explicitly disavowed the operative effect of the District Court's fairness finding, stating:

3. In October of 1997, respondents defamed petitioners by falsely accusing them of failing to tell their clients about the class settlement offer.[8] The accusation was that petitioners were trying to rob their clients of a chance to opt-in.

Petitioners promptly notified the respondents that they reserved the right to seek attorneys' fees from the respondents themselves if the cost and fee fund proved inadequate, and they objected to the consideration promised in the Notices being diminished in the releases.

On October 7, 1997, respondents sought a declaratory judgment that "[b]efore petitioners' clients can be paid,

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> "Releasors further represent and warrant that in agreeing to the terms of this Release, they have not relied on any finding of the fairness of the terms of the Agreement and/or this Release by any Court, including any determinations made by the Court in the *Walker v. Bayer Corp., et al.* action in the United States District Court for the Northern District of Illinois or in the MDL proceedings pending in that same court. Rather, Releasors have reached their own decisions as to the fairness of the Agreement and this Release in consultation with counsel of their choice or have voluntarily elected not to consult with such counsel. Releasors also represent and warrant that they are not relying on the Court's order barring the filing or pursuit of individual claims and they would agree to the terms of the Release even if the Agreement were not part of a class settlement **but rather a completely private settlement**." [emphasis and brackets added] (See Notice, App. 43; Release, App. 91.)

[8] App. 86 (petitioners' letter to the trial court re this incident).

[they] must waive any right to any payment from the $100,000 settlement or from the [respondents] who pay such settlement, other than any amount this Court may award to them from the Cost and Fee Fund." (p. 6, ¶ 20 – ROA #52.) Petitioners responded both by reiterating that they were not seeking any portion of the $100,000 payments to their clients, but compensation from the respondents, and by filing their October 22, 1997, Response To Motion For Enforcement Of Order; Counter Motion For Orders Setting Expedited Hearing, Requiring Payment Of Sanctions, Payment Of Settlement Monies, Payment Of Liens For All Claimants, Rescinding Clause Of Releases Exonerating Governmental Bodies, And Taking Jurisdiction Of And Allowing Discovery On Plaintiffs' And Their Attorneys' Claims Of Fraud, Interference With Contract, Unjust Enrichment, And Breach Of Contract.[9] The pleading sought the relief described in its caption.

Respondents then filed their December 23, 1997, Motion For Adjudication Of Liens Asserted By Mull & Mull, seeking an injunction against the filing of suits attempting to assert Mull & Mull's claims for attorneys' fees might not be met by the cost and fee fund. The trial court set this and the other motions and counter-motions for hearing on January 7, 1998. On February 18, 1998, the trial court issued its final Order Concerning Certain Claims for Attorney Fees (App. 11).[10] Said Order

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[9] Item #(2) added to the record by the trial court's May 26, 1998 Order, Spece & Ibáñez not having received any ROA #.

[10] The full order consists of both the February 18, 1998, Memorandum Opinion and the docket entry because the Opinion does not even bother to mention certain aspects of the

summarily rejected all claims asserted by petitioners for themselves, their clients, and consumer/clients generally. It also, without there having been any request therefor, enjoined these petitioners from pursuing their claims elsewhere. The February 18, 1998 Order was a Final Order. Petitioners filed a Notice of Appeal from that Order on March 19, 1998. (ROA # 94.)

Petitioners argued, before the trial court and on appeal, that respondents were collaterally, judicially, and/or equitably estopped from controverting that there was no even provisional class action here, but, rather, thousands of individual, "consolidated" settlements. Collateral estoppel was argued to apply because the identical issue of certifiability was raised and actually litigated by respondents in several previous cases (including *Rhone*), respondents obtained final judgments thereon, the certifiability issue was necessary and central to the previous cases, and the finding of non-certifiability was invoked against those same parties herein. Indeed, respondents even successfully argued that collateral estoppel barred relitigation of the certifiability issue by consumers of AIDS-tainted blood solids who attempted to pursue a class action in Florida state court.[11] Similarly, judicial estoppel was argued to apply because respondents repeatedly avowed in courts all over the country the non-certifiability of a class action by consumers of AIDS-tainted blood solids, they had won and benefited from taking that position, and they were now attempting to

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relief requested by Spece & Ibáñez. The docket entry is ROA # 80.

[11] See footnote 1 above.

take precisely the opposite position before the courts below. Also similarly, equitable estoppel was argued to apply because respondents distributed ostensible Class Notices/offers that they knew or should have been aware reasonably would be construed as conditioned solely on events that, according to them, in fact occurred. Consumers reasonably and foreseeably relied on the Notices/offers by opting in ("accepting") and foregoing further litigation, but now respondents were attempting to benefit by taking positions wholly inconsistent with the Notices/offers.

Petitioners further similarly argued that the class action was void because it was a collusive suit rather than an actual "case" under Article II, Section 2 of the United States Constitution. It was argued that because the class settlement *qua* class settlement was a *de facto* and *de jure* nullity from its inception, it could only be conceived of as a series of thousands of individual, "consolidated" settlements. This was argued to be true because equity does not allow a wrongdoer to benefit from his derelictions. If respondents were able to simply walk away from the huge series of transactions that they engineered before the trial court because of their misuse or mistaken use of the class action device, they would be benefiting from their own wrongdoing.

Consumers were argued to reasonably expect they would receive $100,000, be protected from all liens or other claims thereon, and that their attorneys would be paid costs and fees pursuant to existing attorney-client contracts. It was argued that the Notices were sent out under the auspices of the trial court and should be strictly construed in favor of the consumers, even more so than

an insurance contract or prospectus disseminated to potential investors. That respondents represented that these conditions had been met and proceeded with settlements could not be gainsaid because they paid moneys and obtained releases in an ongoing process under the auspices of the trial court.

It was also argued that the attorneys were parties to and/or third party beneficiaries of the contracts consummated by the Claim Forms/acceptances. There was no reason to expect that the trial court would abrogate the contingent fee contracts, except to the extent that the circumstances in rare cases (e.g., acceptance of the case shortly before the Notice and without significant effort having been ventured) might require adjustment. The settlement contracts should at least be construed to provide for quantum meruit recovery to consumers represented by counsel.

The trial court negatively adjudicated the contract, tort, and equitable claims asserted by petitioners for themselves, their clients, and all the consumers without notice, discovery, or an evidentiary hearing. The trial court ordered that respondents need not pay petitioners' clients, abrogated their contingent fee contracts, denied (without discussion) the remainder of the relief they requested for themselves, their clients, and all the consumers, and enjoined them from pursuing their claims in any other forum. The latter relief had not even been requested by respondents against these petitioners; it was only requested against Mull & Mull because the latter had in fact filed such collateral proceedings. In any event, the respondents continued to pay petitioners' clients,

indicating they desired to consummate as many settlements as they could. Petitioners made it clear throughout that they were only seeking quantum meruit recovery and then only in proportion to what was equitable to all similarly situated attorneys. They also stated that they waived any right to even that modicum of relief if it would jeopardize any consumer's $100,000 net recovery.[12]

The Seventh Circuit nevertheless reasoned that although the settlement class action was "downright weird" and questionable both "in its form" and "in its terms", petitioners waived their right to review by failing to appeal from the trial court's May 5, 1997, fairness finding. It accused "appellants" (without distinguishing between these petitioners/appellants and Mull & Mull) of purposely sitting back with their objections so as to induce reliance by the court, the respondents, and the PSC. The reliance was said to be in the form of proceeding with the settlement and paying claimants. Petitioners were also accused of jeopardizing payments to their clients by raising arguments that called the settlement-only class action into question. The Seventh Circuit concluded, without analysis, that Article III was complied with, and that, in any event, it was too late in the litigation to take any remedial steps. (App. 4-9.)

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[12] See, e.g., petitioners' Reply Brief, pages 1-2. The limited relief requested for the attorneys is a second difference between these petitioners and Mull & Mull.

REASONS FOR GRANTING THE PETITION

A. The Petition Should Be Granted Because It Raises The Same Issues As In The Court's Pending *Ortiz v. Fibreboard Corporation*[13] Whether Article III And Federal Civil Procedure Rule 23 Requirements Can Be Met By A Friendly Joint Venture.

Once again, the Seventh Circuit characterized the present settlement-only class action as "downright weird" and questionable "both in its form" "and in its terms." It nevertheless tersely observed that "[a]ll the requirements of Article III were satisfied" and "[e]ven if they had not been, it is unlikely that the settlement could be set aside at this late date." The Seventh Circuit is correct as to its characterization of the class action, but incorrect in its conclusions that Article III has been complied with and, in any event, that it is too late to take remedial steps. Remedial steps would actually consist of enforcing the transaction to its full extent rather than unwinding it.

This settlement-only class action is obviously collusive and defective for the several reasons argued by petitioners below: (1) it was brought by an unrepresentative class representative who admittedly was time barred and had no viable claim on behalf of persons both similarly situated *and* with potential multi-million dollar cases;[14] (2) it was brought by "class counsel" who were the same attorneys who: (a) had lost the certification

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[13] 118 S.Ct. 2339 (1998).

[14] Attachment 17 to Appendix G of Mull & Mull's Petition For Writ Of Mandamus Appendix, at 142.

issue in *Wadleigh*, (b) contractually agreed among themselves to recommend that their clients opt-in to any class action;[15] (c) had earlier, to protect their stake in *Wadleigh*, sought to enjoin the filing of additional state or federal suits by attorneys who wanted protection for their clients in the event *Wadleigh* was decertified (these petitioners were the only ones in the country to contest this ploy, and petitioners were successful in their opposition);[16] (d) admitted the cost and fee fund was capped at an arbitrary figure that likely was not enough to compensate both class counsel and "hometown lawyers," but hoped to nevertheless be paid a significant amount beyond quantum meruit on either a lodestar or percentage of the fund approach at the expense of hometown lawyers;[17] and (e) admitted the defendants were pressuring them to opt-in all clients, first, with the constant threat of invoking the clause allowing negation if there were too many opt-outs and, then, by promising fee petition cooperation for maximum opt-ins;[18] (3) it was proposed by defendants/respondents – who had earlier successfully argued to the trial court and courts throughout the country that no Federal Civil Procedure Rule 23 requirements could be met in either a nation- or state-wide hemophilia/AIDS

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[15] Exhibit 6 to Appendix of Mull & Mull on appeal below.

[16] See Exhibit "D" to petitioners' Appendix to their Opening Brief, pages 50-55.

[17] See, e.g., discussions of petitioner Spece and of the PSC's Mr. Green in the transcript of September 5, 1997, proceedings, petitioners' Appendix to their Opening Brief, Exhibit "I," pages 104-112.

[18] See footnote 6 above.

class action – for the explicit purpose of controlling attorneys' fees and negating individual suits that would be valued by the particular facts and the applicable law in each jurisdiction;[19] (4) it created conflicts of interest both by arbitrarily allowing respondents to set a cap on fees and administrative, ADR, litigation and notice costs and by allowing simultaneous negotiation of awards to the class and to class counsel (class counsel being tempted to ask that some of the total expenditure be allocated to fees, with no offsetting incentive to maximize award to the class so as to thereby enhance the PSC's fees); and, through the limitation on opt-outs, it encouraged undervaluing strong cases, thereby skewing the allocative function of the tort law; and (5) it was adopted by a trial court that first expressed skepticism and then jokingly stated that perhaps the deal could be finished in time to avoid a negative ruling by this Court in what became *Amchem Products Inc. v. Windsor*, 521 U.S. 591 (1997).[20]

That collusive suits, even ones encouraged by Congress, do not constitute Article III "cases" was settled by this Court's landmark decision in *Muskrat v. United States*, 219 U.S. 346 (1911). Jurisdiction cannot be founded upon a "contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist." *City of Dawson v. Columbia Ave. Saving Fund*, 197 U.S. 178, 181 (1905).

Even if there had been Article III jurisdiction, it is difficult to conceive how one could conclude that this

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[19] See footnote 4 and text thereat above.

[20] *Id.*

"downright weird" settlement-only class met all the requirements of Federal Civil Procedure Rule 23 when the defendants had successfully argued to the trial court and courts all over the country that even state-wide litigation classes could not meet any Rule 23 requirements. Below respondents ignored the latter precedents and made an attempt to distinguish *Rhone* and *Amchem*. Their argument is the weak one that virtually all Rule 23 requirements are met when there is a settlement-only class because the absence of trial basically vitiates all such concerns. *Amchem* did state that settlement can be relevant to application of Rule 23 insofar as manageability of trial is an issue. (117 S.Ct. at 2248.) However, *Rhone* did not turn on that issue. It turned on a determination that, "on balance," a class action was not superior to individual suits because of undue settlement pressure, different state laws regarding existence and scope of duty and proximate causation, and the prospect of subsequent juries overruling the jury in any class trial. (51 F.3d at 1298-1304.) As set forth above, those *and* additional defects and concerns are part and parcel of the instant settlement-only class action.

As to the Seventh Circuit's concern that the settlement has gone too far to unwind, it is born of failure to recognize petitioners' requested relief. As set forth in the Statement of the Case, petitioners seek to enforce consumers' entitlement to the $100,000 net to them *plus* the additional consideration promised to them in the class notice. It is not a question of unwinding the settlement, but of enforcing it to its full extent in light of the applicable law and equities. Enforcing the settlement(s) to its (their) full extent would not rob respondents of their

consideration, but would teach them and future settlement-only class action engineers that there is a price to be paid for: (1) sending out Class Notices that make certain promises without fair warning as to legal defects that make the deal highly suspect, if not frankly void; and (2) unilaterally diminishing in release forms the consideration promised in the Class Notices.

B. The Petition Should Be Granted Because The Seventh Circuit's Opinion Is Directly Contrary To This Court's Decision In *Amchem*.

This point has been explained in sub-heading A. above.

C. The Petition Should Be Granted To Clarify The Tangled Law As To When Attorneys' Fees Issues Are To Be Reviewed, An Important Issue Both As To Which The United States Courts Of Appeals Are In Conflict And That Needs Particular Clarification In The Context Of Class Actions.

This Court has pending before it, in *Cunningham v. Hamilton County, Ohio*, 1999 WL 13529 (January 15, 1999), the issue whether an attorney who eventually withdraws or is disqualified may take an immediate, interlocutory appeal from an order levying attorneys' fees and costs against her for discovery violations. The United States Court of Appeals for the Sixth Circuit answered this question in the negative. *Starcher v. Correctional Medical Systems, Inc.*, 144 F.3d 418, 423-425 (1998), noting that five circuits had gone one way on the issue, while five had gone the other way.

The instant case raises questions that are both identical to and a mirror image of the one presently before the Court in *Cunningham*: May *or* must an attorney immediately appeal the attorneys' fees implications of an order that finds a settlement-only class action to be fair when it is also stated that fees will be paid out of a separate, capped fund, but that determination of the procedures for, substantive criteria for, and amount of fees will be decided at later hearings? The question just put is identical to the one in *Cunningham* insofar as it asks whether an attorney *may* seek such review. The query is the mirror image of the one in *Cunningham* to the extent that it asks whether one *must* seek such review. This latter inquiry is even tougher because it is bound up with the further, similar questions whether the fact that the amount of attorneys fees has not been determined prohibits an appeal or review as to either the merits of the underlying controversy and/or as to any limited attorneys' fees issues that have been determined.

Courts have attempted to avoid having to confront appeals on both the merits of underlying controversies and on the final amount of attorneys fees in three ways: (1) a local practice that requires prompt presentation and determination of all attorneys' fees issues; (2) allowing the district court to postpone entry of judgment on the merits until attorney fees issues have been completely resolved; or (3) permitting, but not requiring, review of decision of an attorney fee issue (such as whether to award fees as opposed to determination of the amount thereof) along with an appeal on the underlying merits. The latter approach was pioneered by the Seventh Circuit. These questions are confounded by the potentially

contending rule that attorneys' fees issues generally are not considered ripe for review until the amount thereof has been fixed. As to all these points, see Charles Wright, Arthur Miller, and Edward Cooper, 15B *Federal Practice and Procedure* § 3915.6 (1992 with 1998 Pocket Part).

The set of review of attorneys' fees questions is so complex that it has led to conflicting decisions by the Fifth and Third Circuits on whether one may or must appeal an attorney fee award against one defendant if there has been a Civil Rule 54(b) judgment on the merits as to that defendant. The Fifth Circuit has held that a fee award as to claims against one defendant that had earlier passed into final judgment under 54(b) could not be final without a second entry of a 54(b) judgment as to the fee award. *Sidag Aktiengellschaft v. Smoked Foods Prods. Co.*, 813 F.2d 81, 84 (1987). The Third Circuit has held that failure to appeal the fee award in the circumstances faced in *Sidag* forfeits the right to appeal after entry of final judgment as to all parties. *Johnson v. Orr*, 897 F.2d 128 (3rd Cir. 1990).

The result in *Johnson* is absolutely unfair and Draconian. The result in the instant case is no less Draconian. If, as required by the courts below, petitioners had appealed the trial court's May 5, 1997, fairness finding on the sole issue that the settlement class action found fair thereby provided that all attorneys' fees would be paid out of a separate, capped fund, respondents and class counsel would have ineluctably argued that the appeal was premature, if not frivolous. After all, the fund might or might not be sufficient to pay the equivalent to contingent fees to individual lawyers as well as a lodestar or percentage of fund recovery to class counsel for the very

reason that the vast majority of the estimated 6,000 victims were not under contract with any counsel. Moreover, not only the amount of fees remained to be set; also remaining to be determined was whether contingent fee contracts would in fact have to be disregarded, the procedures for determining attorneys' fees, and the substantive criteria for awarding attorneys' fees. All these issues were, by explicit determination in the settlement agreement and by order of the court, to be determined in separate, later hearings.[21]

The Seventh Circuit implied that if petitioners were not untimely in their appeal, they were nevertheless equitably estopped because they did not timely call the district court's attention to problems with the settlement-only class action. As pointed out above, the District Court was well familiar with these problems.[22] As explained in the Statement of the Case, moreover, these petitioners early explicitly warned the trial court about the unethical nature of the separate capped fund. Moreover, they reminded the district court of these problems, sought affirmative relief, and then timely appealed once respondents' misconduct in the implementation of the settlement made clear that respondents were attempting to exploit the conflicts of interest petitioners had warned the court about many months before.

It is no doubt tempting to conclude massive litigation by sacrificing the interests of a few troublesome mavericks and disregarding "technical" rules. However,

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[21] See footnote 3 and text thereat above.

[22] See footnote 4 and text thereat above.

important policy interests are threatened along with these few attorneys. Setting the administrative, ADR, litigation and notice costs and attorneys' fees at an arbitrary figure high enough to entice the PSC but perhaps inadequate to compensate attorneys who had been handling individual cases was improper. Elemental fairness requires that costs and fees be compensated consistent with existing, valid markets. Moreover, *all* the substantive and procedural policies of tort law and class action jurisprudence are undercut to the extent that fees awarded to attorneys who initially undertake the risk of litigation and have responsibility for *individual* claims are not adequately compensated. These attorneys (often called "hometown attorneys"), who prefer to pursue the purposes of the tort law through individual representation, are likely not to be willing to fulfill their important functions in the future. This leaves class action litigation by class action attorneys as the only likely alternative. As the Seventh Circuit pointed out in *Rhone*, individual litigation of several suits, even in the context of MDL litigation, might be preferable in certain situations.

D. The Petition Should Be Granted Because The Decision Below Is Contrary To Precedent Of This Court And Of Other United States Courts Of Appeals Indicating That Class Notices Are To Be Strictly Construed And Enforced Because They Are Distributed Under Court Supervision.

This Court observed in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 357 (1978), that "Rule 23 . . . contemplated that the district court routinely must approve the form of the class notice and order how it should be

sent and who should perform the task." The courts' involvement calls for an especially high degree of honesty and disclosure in the Class Notice. Thus, the court in *Gendron v. Shastina Properties, Inc.*, 578 F.2d 1313, 1315 (9th Cir. 1978), construed a class notice in favor of the claimant and against the settlement committee who attempted to exclude her claim under the language of the Class Notice.

Here, on the other hand, the District Court allowed respondents to trash the Class Notice. The District Court blinked at the many respects in which the releases distributed by respondents diminished the consideration promised in the Class Notice. Space does not allow consideration of each of these differences,[23] but typical is the release provision stating that claimants are in no way relying on the court's fairness finding and are executing the releases as if in an individual case rather than a settlement class action certified, found fair, and supervised by a United States District Court. The District Court here purported to justify this provision as a legitimate attempt to insulate respondents from the possibility that claimants would accept the settlement and then nevertheless attempt to file individual suits. This possibility seems far-fetched, unless the court was attempting to obviate suits enforcing the promises made in the Class Notices.

Perhaps this is precisely what the district court had in mind because it also enjoined petitioners – especially these petitioners as to whom an injunction was not even requested – from filing suits in any forum where such an

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[23] See footnote 7 above.

argument might be made. It seems that the district court would, if it could have, prohibited attempted appeal to the Seventh Circuit.

Indeed, the Seventh Circuit has now implied that seeking review in this Court would be unethical by accusing petitioners of improper conduct in merely making the arguments they have made to date. The unfairness of this reasoning is reflected in the inherently contradictory nature of the Seventh Circuit's ruling. It stated that "appellants", without distinguishing between these appellants/petitioners and Mull & Mull, were equitably estopped from raising objections to the settlement-only class action because they supposedly did not raise them before the trial court made a final fairness determination. At the same time, the Seventh Circuit implied that "appellants" were unethical because they jeopardized the settlement payments to their clients by later raising objections to the structure of the settlement itself.

The overall position of the Seventh Circuit is inherently contradictory because it would follow from the Seventh Circuit's logic that petitioners would have been even more unethical and antithetical to their clients' interests if they had earlier rather than later questioned elements of the settlement-only class action. Then they would not have waived, and presumably would have prevailed as to, their objections. After all, the Seventh Circuit said the settlement was "downright weird" and "questionable." In other words, the more unethical petitioners would have been under the Seventh Circuit's logic, the more likely they would have been to prevail on the merits of their claims under the Seventh Circuit's logic; and *vice versa*.

Even apart from this contradiction, the Seventh Circuit's reasoning was unsound because these petitioners did early alert the trial court to the ethical problems with the settlement-only class action. Nevertheless, they conditionally waived their objections under the reasoning that the transaction might be implemented in the claimants' best interests. They balked promptly when respondents' implementation conduct made it clear that respondents intended to exploit the conflicts of interest respondents had built into the transaction. Moreover, petitioners sought to enforce the full consideration promised in the Class Notices, not to deprive the claimants of any consideration. Finally, these petitioners explicitly waived their rights to any personal recovery if their positions were determined to entail the notion that any claimant should be deprived even a penny of his $100,000 net payment called for in the Class Notices. Although the Seventh Circuit accused petitioners of not caring if the deal were destroyed by not allowing sufficient payment to other counsel, these petitioners also made clear that if there were not enough money to fairly compensate all counsel, they should be paid only quantum meruit or a share thereof proportionate to what was able to be paid to all counsel. The class counsel/PSC balked at this because it might threaten their claims to either a lodestar or even larger percentage of the fee recovery.[24]

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[24] See footnotes 12 and 17 above.

CONCLUSION

This Petition should be granted for the several reasons that it raises the same Article III and Civil Rule 23 questions pending before the Court in *Ortiz;* the opinion below is directly contrary to both this Court's *Amchem* decision and precedents of this Court and other United States Courts of Appeals indicating that Class Notices are to be strictly enforced because they implicate the very integrity of the courts; and the law as to when attorneys' fees issues may or must be reviewed is in disarray, thereby undercutting important procedural and substantive policies.

Respectfully submitted this 2d day of February, 1999.

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Nos. 98-1242, 98-1243

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

MULL & MULL, PLC,
Petitioner,
v.
RHÔNE-POULENC RORER INC., *et al.*,
Respondents.

ROY G. SPECE, JR. and ROSE MARIE IBANEZ,
Petitioners,
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Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

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13098

QUESTION PRESENTED

Whether certain plaintiffs' attorneys who supported a nationwide class settlement prior to the final district court judgment that approved the settlement, and who did not appeal that final judgment, may, on collateral attack, seek to have the settlement declared void so that they can evade the explicit provision of the settlement agreement governing attorneys' fees?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondents state the following:

The parent company of Rhône-Poulenc Rorer Inc. ("RPR Inc.") is Rhône-Poulenc S.A. All subsidiaries of RPR Inc. are wholly owned.

The parent company of Armour Pharmaceutical Company ("Armour") is Rhône-Poulenc Rorer International (Holdings) Inc. All subsidiaries of Armour are wholly owned.

The parent company of Bayer Corporation is Bayer A.G. Schein Pharmaceutical, Inc., Onyx Pharmaceuticals, Inc., Millenium Pharmaceuticals, Inc., and Myriad Genetics, Inc. are nonwholly-owned subsidiaries of Bayer Corporation.

Baxter Healthcare Corporation's ("Baxter Healthcare") parent company is Baxter International, Inc. Baxter owns stock in certain publicly-traded companies and is filing this information under seal with the Clerk of the Court.

The parent company of Alpha Therapeutic Corporation ("Alpha Therapeutic") is Green Cross International, Inc. Business Travel Specialists, Inc., G.C. Pharmaceutical (Singapore) Ptc Ltd., Grifols UK Ltd., and Grifols Italia, SpA, are nonwholly-owned subsidiaries of Alpha Therapeutic.

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Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

To make the procedural posture of this case clear:

The petitions challenge a final class settlement that has already paid $596.7 million—free of most government, health insurer, and attorney claims—to 5,967 hemophiliacs who claim that they contracted HIV from the plasma

therapies used to treat their bleeding disorder, the families of these hemophiliacs, and their estates. Petitioners are *not* dissatisfied class members seeking to challenge that settlement. Rather, petitioners are a few dissident plaintiffs' attorneys who admit that they deliberately withheld their present objections to the class settlement until the judgment was final and respondent fractionators[1] were obligated to pay class members. Opp. App. 51a.[2] Petitioners then launched this collateral attack in order to evade a key provision of the settlement, which established a $40 million cost and fee fund to be the exclusive source of compensation for plaintiffs' attorneys.

Petitioners Mull & Mull, Roy Spece, and Rose Ibanez want this Court to declare void the final judgment that certified the settlement class and approved the settlement, so that they can seek, through satellite lawsuits filed in state court, attorneys' fees above and beyond those provided in the class settlement. To rationalize their attack on the class settlement, in which many of their own clients are participating, petitioners propose the fiction that fractionators made thousands of irrevocable individual settlement offers when, pursuant to the terms of the class settlement agreement, fractionators mailed release forms to class members.

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[1] "Fractionation" is the process by which blood plasma is separated into its derivatives. Fractionators are Armour Pharmaceutical Co., Bayer Corp., Baxter Healthcare Corp., and Alpha Therapeutic Corp. Also named as a defendant is Rhône-Poulenc Rorer Inc., the indirect parent corporation of Armour.

[2] To support their Counter Statement of the Case, which differs significantly from that presented by petitioners, fractionators have reproduced certain key materials in the appendix to this brief ("Opp. App.") and have lodged with the Clerk of the Court copies of fractionators' appendix to their brief in the court of appeals ("FA"), which reproduces additional settlement documents and excerpts from the record of this case.

Both the district court and the court of appeals rejected petitioners' contorted theories. Both courts held that the district court had jurisdiction to enter judgment approving the class settlement and declined to declare that final judgment void based on this Court's subsequent decision in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 117 S. Ct. 2231 (1997). And both courts arrived at the unremarkable conclusion that attorneys cannot pretend to support a final judgment that approves a class settlement and later attack that settlement in a bid for higher fees.

There is nothing about those holdings that is remotely worthy of review. No decision of this or any other court has allowed attorneys to engage in the cynical procedural gamemanship being pursued by petitioners. Nothing in the Article III or Rule 23 decisions upon which petitioners rely supports their attack on a final judgment that is benefiting thousands of persons. And, as demonstrated below, nothing in the record of this case points to any gross impropriety in the settlement warranting intervention by this Court to consider facts unique to this litigation.

COUNTER STATEMENT OF THE CASE

1. Hemophilia is an incurable bleeding disorder caused by deficiencies of certain clotting factors in the blood. It is treated by administering the missing clotting factors to the patient. In the late 1960s and early 1970s, fractionators developed freeze-dried clotting factor concentrates that resulted in "the return to a full range of activities for many patients who were previously wheelchair-bound" and, between 1968 and 1983, a doubling in the life expectancy of persons with hemophilia. FA 904.

The advent of the disease now known as AIDS had a tragic impact on persons with hemophilia. The first cases

of the disease were reported in June and July of 1981 in homosexual men. FA 897, 899. A year later, AIDS-like symptoms were first reported in three persons with one form of hemophilia. FA 902. But it was not until 1984 that: (a) the medical community reached a consensus that AIDS was transmissible by blood; (b) scientists identified the retrovirus now called HIV and known to be the cause of AIDS; and (c) the Centers for Disease Control demonstrated that HIV was inactivated by heat-treatment processes that had recently been approved to inactivate hepatitis in certain factor concentrate. *In re Rhône-Poulenc Rorer Inc. ("RPR")*, 51 F.3d 1293, 1296 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995); FA 923. The following year, the first blood screening test to detect antibodies to HIV was licensed. *Kozup v. Georgetown Univ.*, 663 F. Supp. 1048, 1052 (D.D.C. 1987), *aff'd in part and vacated in part*, 851 F.2d 437 (D.C. Cir. 1988).

These discoveries came too late for many persons with hemophilia. About 50 percent of the hemophiliacs who used factor concentrates between 1978 and 1985 were infected with HIV, most before January 1983. FA 915. Thus, before anyone knew that AIDS was transmissible by blood and plasma products, thousands of people with hemophilia had already been infected. *See RPR*, 51 F.3d at 1296.

2. More than 350 lawsuits have been filed in state courts and approximately 230 have been filed in federal courts alleging HIV transmission through factor concentrate. In late 1993, all pending federal factor concentrate cases were consolidated in the Northern District of Illinois before Judge John F. Grady. *In re Factor VIII & IX Concentrate Blood Products Prod. Liab. Litig. (MDL-986)*, 853 F. Supp. 454, 456 (J.P.M.L. 1993). Thomas Mull—a name partner in petitioner Mull & Mull—was

among the attorneys named to Plaintiffs' Steering Committee ("PSC"). FA 210-18.

In late 1994, the district court certified a nationwide "issue" class for the purpose of determining whether the fractionators were "guilty of ordinary negligence." *Wadleigh v. Rhône-Poulenc Rorer,* 157 F.R.D. 410, 426 (N.D. Ill. 1994). The United States Court of Appeals for the Seventh Circuit subsequently issued a writ of mandamus ordering the district court to decertify the class for three reasons: 1) the class trial on the issue of negligence would irreparably injure fractionators by placing upon them unfair pressure to settle; 2) the district court's plan to give the jury "a kind of Esperanto instruction" did not reflect the nuances in the negligence law of any jurisdiction; and 3) the bifurcated trial procedure proposed by the district court would violate the Seventh Amendment because issues that would be determined in the negligence "issue" trial overlapped wtih issues that would be determined by different juries in the subsequent individual trials. *RPR,* 51 F.3d at 1299, 1303. This Court denied PSC's petition for certiorari, 516 U.S. 867 (1995), and the *RPR* class was decertified. FA 338.

3. On April 19, 1996, fractionators proposed a settlement that would pay up to $100,000 for each HIV-positive hemophiliac who used factor concentrate and for certain persons allegedly infected with HIV through exposure to such hemophiliacs. The total value of this part of the April 1996 settlement proposal was limited to $600 million; if more than the anticipated 6,000 claims were filed, each claimant would be paid less than $100,000. FA 355, 416. Because certain plaintiffs had made settlement demands of $100,000 net of attorneys' fees, *see* FA 361, fractionators proposed the establishment of a separate $40 million fund from which the costs of implementing the settlement would be paid and from which the

district court would award reasonable costs and attorneys' fees to plaintiffs' attorneys. FA 355. PSC rejected fractionators' proposal. FA 353.

After several months of intense negotiations, fractionators and PSC agreed to the present class settlement, in which fractionators agreed to pay $100,000 for each claim, even if the number of claims exceeds 6,000. FA 8 § B; *see also* FA 354-55, 405. The settlement agreement expressly required claimants to execute releases in order to receive payment. FA 41 § M. Fractionators also undertook to pay additional monies to resolve federal and state Medicare and Medicaid claims as well as the claims of most private health insurers, so that claimants would receive the settlement payments free and clear of most outstanding claims. FA 46 § P(1). Finally, the settlement agreement stated that plaintiffs' attorneys would not be entitled to collect fees based upon a percentage of the settlement paid to class members and that the $40 million fund was the exclusive source for all costs and attorneys' fees, which would be awarded by the district court. FA 40-41 §§ L(2) & (5).

4. In August, 1996, PSC sought preliminary certification of a nationwide settlement class in the case of *Walker v. Bayer Corp.*, 96-C-5024 (N.D. Ill.). FA 394-97. Mull was listed as counsel on the *Walker* complaint. FA 393. He attended the hearing at which the district court gave its preliminary approval to the settlement and authorized the issuance of notice to the class. FA 399. Mull did not object to the proposed class settlement. FA 412-13, 429-38. Petitioner Ibanez filed a three-page brief in which she asserted that the $40 million cost and fee fund was insufficient in amount but expressly waived that objection on the understanding that (1) all costs would be paid and (2) "the probable burden of inadequate fees is spread evenly among all the attorneys . . . ." Opp. App. 99a.

Mull was among the plaintiffs' attorneys who moved for final approval of the class settlement. FA 455. After notice issued, the vast majority of persons in the hemophilia community who were entitled to file claims did so. FA 528-29.

On November 25, 1996, the district court held a day-long fairness hearing. Both Spece and Mull were present. FA 519. Neither objected to the class settlement. Mull's comments focused upon a settlement implementation issue —establishment of a trust mechanism so that receipt of the settlement money would not disqualify class members from government entitlements. FA 540-44, 563-68.

The district court did not rule immediately upon the fairness of the settlement because, *inter alia*, fractionators were still negotiating with the United States government, state governments, and dozens of insurers to compromise any claims against settlement monies that would be paid to class members. FA 573-82. Fractionators eventually paid more than $30 million to secure these compromises; each of the agreements with insurers and government entities refers specifically to the class settlement. *E.g.*, FA 156, 176, 194. Working with PSC and the hemophilia community, fractionators also secured the passage of legislation that endorsed the *Walker* class settlement by name and provided that receipt of the $100,000 settlement payment would not affect claimants' eligibility for medical assistance payments. *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4735, 111 Stat. 251, 522 (1997).[3]

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[3] Section 4735 provides:

(a) IN GENERAL.—Notwithstanding any other provision of law, the payments described in subsection (b) shall not be considered income or resources in determining eligibility for, or the amount

On May 6, 1997, a second fairness hearing was held. In correspondence prior to the hearing, Mull argued that class members should be given a new opportunity to opt out of the settlement based on purported newly discovered evidence, but he did not challenge certification of a settlement class or assert that the settlement was unfair. FA 640, 667. At the hearing, a Mull colleague made the same argument. FA 612. He also complained of alleged fraud on the part of fractionators and PSC. FA 634-35. However, Mull's colleague expressly stated that he was not asking the court to reject the settlement. FA 630, 685; Pet. App. 69-70. Robert Arceneaux, Mull's attorney, also appeared and stated that he did not object to certification of the settlement class or final approval of the class settlement. FA 677-80.

The district court concluded that Mull *et al.* had not identified any new evidence or colorable basis for their fraud allegations and refused to reopen the opt-out period.

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of benefits under, a State plan of medical assistance approved under title XIX of the Social Security Act.

(b) PAYMENTS DESCRIBED.—The payments described in this subsection are—

(1) payments made from any fund established pursuant to a class settlement in the case of Susan Walker v. Bayer Corporation, et al., 96-C-5024 (N.D. Ill.); and

(2) payments made pursuant to a release of all claims in a case—

(A) that is entered into in lieu of the class settlement referred to in paragraph (1); and

(B) that is signed by all affected parties in such case on or before the later of—

(i) December 31, 1997, or

(ii) the date that is 270 days after the date on which such release is first sent to the persons (or the legal representative of such persons) to whom the payment is to be made.

FA 701-06; Pet. App. 69-70.[4] Thereafter, the district court removed Mull from PSC. FA 709.

5. On May 8, 1997, the district court entered final judgment certifying the settlement class, approving the class settlement, and ordering the parties to implement the settlement agreement according to its terms. Pet. App. 78-80. The court held that the cost and fee provision of the settlement, which created a separate $40 million fund from which reasonable attorneys' fees were to be paid, was fair and reasonable to the class, but the court reserved decision regarding the payment of such costs and fees. Pet. App. 79-80. The court entered final judgment pursuant to Fed. R. Civ. P. 54(b), and reserved exclusive jurisdiction for purposes of supervising implementation of the settlement and allocation of fees. Pet. App. 80. (As of this date, some claims for attorneys' fees have been paid from the fund, but the district court has yet to rule upon petitioners' principal claims for fees and has not awarded fees to PSC.)

Two appeals were filed by nonparty class members, but were voluntarily dismissed. FA 710-13; *Dowling v. Alpha Therapeutic Corp.*, No. 97-2410 (7th Cir., appeal dismissed July 16, 1997); *Otis v. Bayer Corp.*, No. 97-2556 (7th Cir., appeal dismissed July 24, 1997).[5]

6. Six weeks after the judgment approving the class settlement was final, this Court decided *Amchem Prods.*,

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[4] The district court did provide that individual class members would be allowed to opt out if they showed "exceptional circumstances" supporting their untimely request. FA 709a-c.

[5] Fractionators initially moved to dismiss the appeals on the ground that appellants lacked standing. *See In re Brand Name Prescription Drugs Antitrust Litig.*, 115 F.3d 456, 457-58 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 1337 (1998). Thereafter, the parties and the putative appellants agreed that the putative appellants could opt out of the class.

Inc. v. Windsor, 521 U.S. 591, 117 S. Ct. 2231 (June 25, 1997). Within days, fractionators received a letter from Arceneaux (a) stating that he and Mull had filed competing class actions in Louisiana state court, (b) suggesting that a class settlement "may not now be available" in federal court, and (c) proposing a state court class settlement with Mull and Arceneaux as plaintiffs' counsel to solve "issues that are now subject to great uncertainty." FA 714-15.

On August 15, 1997, Mull wrote to fractionators asserting that *Amchem* "threatens the legitimacy of this settlement as a 'class' " but stating that his clients wanted to accept fractionators' settlement offer. FA 716-17. He then requested that settlement checks be prepared with his name and that of a colleague as co-payees with his clients. FA 716. This request appeared to conflict with the settlement agreement, which provided that attorneys were not entitled to any percentage of the settlement monies paid to class members. FA 37-38 § L(2). Mull also stated that his firm was asserting a lien against the cost and fee fund. FA 717.

Mull, Spece, and Ibanez subsequently filed purported liens against not only the cost and fee fund, but against fractionators' assets generally. FA 718-21, 869-77.[6] When fractionators moved to enforce the fee provisions of the settlement agreement, petitioners challenged the validity of the settlement. FA 722-23, 731-32, 791-92; Pet. App. 16-17.

Petitioners asserted that the class settlement was a nullity and that fractionators instead had made 6,000 individual settlement offers to pay $100,000, net of attor-

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[6] Petitioners later recharacterized the putative liens against fractionators' corporate assets as causes of action that they would pursue in separate litigation. Opp. App. 17a.

neys' fees, to class members. Pet. App. 17; Opp. App. 5a, 20a, 22a-23a. According to petitioners, for each individual settlement offer that was accepted, fractionators had to pay an additional $50,000 or more to complaining attorneys.[7]

On January 6, 1998, Mull filed in Louisiana a lawsuit asserting that fractionators had tortiously interfered in the contingent fee contracts between Mull & Mull clients by, *inter alia*, directly communicating with Mull clients, attempting to limit Mull's fee recovery to the $40 million cost and fee fund, and attempting to compel the district court to abrogate Mull's contingent fee contracts. Pet. App. 106-23. The complaint sought not only the alleged fees, but also punitive damages. Pet. App. 122-23.

On January 7, 1998, the parties appeared before the district court. Counsel for Mull & Mull told the district court that the firm never intended to abide by the fee provisions of the class settlement:

> MR. ARCENEAUX: [T]he point is Mull & Mull could not have attacked the settlement without incurring some problem with the clients that it had that wanted to opt in. So it made the conscious election relying upon federal jurisprudence, since it had not been cited, it had not been served, it had not been named as a defendant or a class member, that if it stood by and let this class be certified, if certification became a problem for it, that at the appropriate time, it would have the absolute right under federal law to raise whatever issues it needed to raise when

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[7] Since Mull & Mull had a 33% contingent fee arrangement with certain clients, that firm contends that fractionators' $100,000 payment to each settling Mull client obligated fractionators to pay $50,000 to Mull. Since Mull claims to represent 318 claimants, the firm seeks more than $16 million in attorneys' fees. Spece and Ibanez seek $66,000 per claimant, based on a 40% contingent fee contract. *See* FA 741-42; Opp. App. 82a.

it was appropriate to defend its rights and its own clients' rights were no longer in jeopardy. That is the reality.

THE COURT: So you are saying that they had the intent all along, Mr. Mull had the intent all along to challenge the settlement once it had been effected?

MR. ARCENEAUX: They had the intent all along to collect their contingent fees.

Opp. App. 51a. The Mull firm stated its intention to file additional lawsuits in other courts relating to Mull's fee demands. Opp. App. 16a-17a, 94a. Spece and Ibanez asked the district court to award them compensatory and punitive damages for fractionators' supposedly tortious conduct with respect to fees and indicated that they too might file additional lawsuits related to the class settlement. Opp. App. 67a; FA 802-03. The court warned petitioners that it was considering enjoining them from pursuing any such litigation. Opp. App. 94a-95a.

On February 18, 1998, the district court granted fractionators' motion to enforce the attorneys' fees provisions of the class settlement. Pet. App. 11-29. The court ruled that complaining attorneys were (a) bound by the settlement, which superseded contingent fee contracts, and (b) estopped from attacking the class settlement now. Pet. App. 19-21, 28-29. The court held that the judgment approving the class settlement was final prior to the *Amchem* decision, and reiterated that the settlement did not present the problems raised in *Amchem*. Pet. App. 18-19. Specifically, the district court observed that "[t]he considerations which prompted the Supreme Court to set aside the judgment in *Amchem*—primarily the lack of any genuine adversarial process and the lack of any guarantee of fair representation of absent class members—are simply not present here." Pet. App. 19. The court also rejected petitioners' claims that the releases constituted 6,000 individual offers to settle that superseded any class settlement and that the releases deviated from the terms of the

settlement agreement. Pet. App. 22-26. Finally, the district court held that the liens asserted by petitioners were invalid and enjoined petitioners from pressing their demand for fees related to the class settlement before any other court. Pet. App. 26-29. Mull, Spece, and Ibanez appealed.

With the assent of the district court, fractionators had deferred making settlement payments to petitioners' clients while the district court considered petitioners' claim that the class settlement was void. Opp. App. 1a-3a. Fractionators resumed these payments after the district court ruled on February 18. Nevertheless, Mull petitioned for a writ of mandamus seeking an order directing fractionators to make the payments that they were already making.[8]

8. The court of appeals consolidated the mandamus petition with the appeals and affirmed the order of the district court in an unanimous and forceful decision by Chief Judge Posner. After recounting the history of the factor concentrate litigation,[9] the court of appeals observed:

> [Petitioners] accuse the lawyers for the class and for the defendants—groundlessly, as far as we can tell—of defamation, bait-and-switch tactics, hoodwinking, infamy, dishonesty, illegality, intimidation, extortion, hyprocrisy, hysteria, and Marxism. *Yet they did not oppose the settlement.* They objected initially to the amount of the settlement but their objection was rejected after a hearing and they did not renew their opposition or appeal from the consent decree, of which their clients have, as we noted, taken full ad-

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[8] Ironically, Mull now complains that fractionators improperly rushed payment to class members. Mull Pet. 20.

[9] The panel that heard this case (Posner, C.J., and Bauer and Rovner, JJ.) was well-acquainted with proceedings in *In re Factor VIII & IX Concentrate Blood Products Prod. Liab. Litig. (MDL-986)*, having ruled upon two previous mandamus petitions produced by the multi-district proceedings.

> vantage. And at no time did they object to the attorney's fee provision of the settlement.

Pet. App. 3 (original emphasis).

The court of appeals ruminated, in dicta, that the settlement "may well be questionable, both in its form . . . and its terms," Pet. App. 4,[10] but emphatically stated:

> *[T]here is no question of the district court's having exceeded its jurisdiction in entering the decree.* All the requirements of Article III were satisfied.
>
> Even if they had not been, it is unlikely that the settlement could be set aside at this late date. . . . The principle that jurisdictional defects may be noticed at any time is limited . . . by the equally important principle that litigation must have an end. *After a case has become final by exhaustion of all appellate remedies, only an egregious want of jurisdiction will allow the judgment to be undone by someone who, having participated in the case, cannot complain that his rights were infringed without his knowledge.*

Pet. App. 4-5 (emphasis added). The court of appeals further held that, "[h]aving participated in the settlement proceeding and having failed to make timely objection to it, [petitioners] are barred by the principles of waiver and equitable estoppel from challenging the settlement after it has become final and the defendants have paid and the class members have received hundreds of millions of dollars." Pet. App. 7-8.

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[10] The court of appeals cited and distinguished *Amchem*, 521 U.S. 591, 591, 117 S. Ct. 2231, and characterized as "downright weird" the structure of the settlement, which paid identical sums to all claimant groups "even though the strength of their cases (some of which appear to be barred by the statute of limitations) and the amount of their damages must vary greatly." Pet. App. 4. *But see* Pet. App. 70-71 (discussing outcome of cases tried prior to class settlement and strength of class members' claims).

The court of appeals also addressed petitioners' allegations of fraud, describing them as—

> fantastic and even preposterous. The most fantastic is the claim by one of them [Mull] that he was on the verge of negotiating a $1.8 billion settlement with the defendants when the class lawyers by a dastardly maneuver preempted him by agreeing to accept a measly $600 million. If this were true, which we do not for a moment believe, the lawyer would have been ethically obligated, as well as impelled by powerful motives of self-interest, to bring this to the attention of the district judge in the hearing that the judge conducted (and the lawyer attended) on the fairness of the settlement.

Pet. App. 7.

Finally, the court of appeals held that the district court had properly exercised its authority under the All Writs Act, 28 U.S.C. § 1651, in enjoining petitioners from attempting to enforce their contingent fee contracts or liens. The court of appeals called petitioners' claim that they were entitled to file suit in other jurisdictions "a dagger aimed at the heart of the settlement and therefore properly enjoinable." Pet. App. 8. The court stated that petitioners' attack on a settlement in which their own clients were participating "raises serious ethical concerns" and constituted a "sufficient danger" to their own clients to warrant the district court's injunction. Pet. App. 9. The court of appeals denied a petition for rehearing by Spece and Ibanez.

REASONS THE PETITIONS SHOULD BE DENIED

The petitions raise no issue worthy of this Court's review. Petitioners cite no authority—and there is none—for the proposition that they can represent clients participating in an enormous class settlement, lie to the district

court about their support for that settlement, and then, after the district court has entered final judgment approving the settlement, attack that judgment in order to evade the settlement's explicit fee provisions. Petitioners can indignantly cite Article III and *Amchem* until the end of time. But that does not change the fact that they are legally and equitably barred from attacking the judgment of the district court.

Even if petitioners were not barred, the jurisdictional and *Amchem* arguments that they attempt to raise are not properly presented here. As the district court and the court of appeals concluded, the record demonstrates that the district court had Article III jurisdiction. Petitioners' disagreement with that holding has no legal support and is, at best, a request for correction of putative error that petitioners could have raised before the judgment approving the class settlement became final. *Amchem* simply does not apply because it was decided after the final judgment that approved the factor concentrate class settlement. In any event, this settlement does not involve the conflicts in class interests at issue in *Amchem*. Approval of this settlement was within the discretion of the district court, and questions regarding the manner in which the court exercised its discretion are not an appropriate basis for reopening a final judgment.

Petitioners' remaining arguments are inherently fact-bound requests for correction of nonexistent errors. These claims do not warrant review by this Court and most certainly do not support a challenge to a final judgment that has already placed almost $600 million directly in the hands of settling class members.

I. Certiorari should be denied because the petitioners are barred from challenging the final judgment of the district court that approved the class settlement. Petition-

ers were actively involved in the multidistrict factor concentrate litigation and the process that led to final approval of the class settlement. Thomas Mull was a member of Plaintiffs' Steering Committee at the time the class settlement was negotiated and approved. FA 210-18, 709. He is listed as counsel on the class complaint and the motion filed by class counsel seeking final approval of the settlement. FA 455. A Mull colleague expressly told the district court that "they were not opposing the settlement" and "the settlement should go forward." FA 613, 630. Mull never objected to the fee provision that was an integral part of the class settlement agreement or suggested that his interests were in conflict with those of his clients. Pet. App. 12. Similarly, Spece and Ibanez participated in several hearings relating to the settlement without ever suggesting that it was void. Pet. App. 12. They complained that the cost and fee fund was too small, but they expressly waived that objection to the class settlement. Opp. App. 99a. Only after the settlement was final did these attorneys assert their outrageous fee demands and launch their attack on the settlement in an attempt to extort more money from fractionators. Petitioners' self-interested attack on the class settlement comes too late.

A. Mull argues that petitioners' bushwacking litigation tactics do not matter. According to Mull, petitioners are not bound by the final judgment approving the class settlement because they are not "parties" to the factor concentrate litigation. Mull asserts that the lower courts erred by "ignor[ing] the well established rule that no one is required to defend, or appear, in litigation unless named as a party." Mull Pet. 28. He asks this Court to grant certiorari to correct this error.

Not surprisingly, none of the cases cited by Mull supports the bizarre proposition that a final, judicially-

approved class settlement that includes specific provisions governing attorneys' fees does not bind attorneys who participated in the proceedings.[11] The fact that petitioners are not "parties" is irrelevant. As this Court has observed, nonparties can be bound by a judgment. *See Richards v. Jefferson County*, 517 U.S. 793, 798 (1996).

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[11] Most of the cases cited by Mull do not involve challenges brought by attorneys. *See Martin v. Wilkes*, 490 U.S. 755 (1989) (firefighters who failed to intervene in employment discrimination proceedings in which consent decrees were entered could subsequently challenge employment decisions made pursuant to those decrees); *Richards v. Jefferson County*, 517 U.S. 793 (1996) (taxpayers who did not participate in prior litigation over the constitutionality of county's occupation tax could challenge the alleged unconstitutional deprivation of their own property); *Local No. 93 v. City of Cleveland*, 478 U.S. 501, 529-30 (1986) (consent decree between association of black and Hispanic firefighters and city could not "dispose of the valid claims" of nonconsenting labor union or "[impose] obligations" on it); *see also Rossi v. Boston Gas Co.*, 833 F. Supp. 62 (D. Mass. 1993) (without adequate proof that employee benefit plan had been served with process, plan was not a party properly before court in ERISA action); *Warnock v. Pecos County, Texas*, 116 F.3d 776, 778 (5th Cir. 1997) (incorrectly cited in Mull Petition as *Tank v. Southern Methodist Univ.*, 116 F.3d 775 (5th Cir. 1997)) (holding in case involving § 1983 claims brought by county auditor against state district judges there was no "privity between the county and the judges in their individual capacities").

The few cases involving attorneys do nothing to support petitioners. *See United States v. Schwimmer*, 968 F.2d 1570 (2d Cir. 1992) (appellate counsel could receive payment from court-controlled assets, pursuant to a stipulation with the government, after Schwimmer entered into a RICO Forfeiture Settlement Agreement with the government); *Fleming v. Lake Delton Dev. Co.*, 241 F.2d 865, 366 (7th Cir.), *cert. denied*, 355 U.S. 821 (1957) (district court could not extinguish attorney lien simply by mailing notice to the attorney, who had withdrawn from the case some time earlier and was no longer participating in proceedings); *Britton v. Seale*, 81 F.3d 602, 606 (5th Cir. 1996) (attorneys sued for malpractice not barred from contesting probate court order that transferred from deceased mother to her children any claims against profes-

Attorneys are officers of the court. When they appear before the court, they submit themselves to its inherent authority. *See Theard v. United States*, 354 U.S. 278, 281 (1957); *In re Orthopedic "Bone Screw" Prods. Liab. Litig.*, 132 F.3d 152 (3d Cir. 1997); *Skelton v. General Motors Corp.*, 860 F.2d 250 (7th Cir. 1988), *cert. denied*, 493 U.S. 810 (1989). Persons who have had the opportunity to litigate an issue before a court entered final judgment are barred from raising the issue on collateral attack. *Lambert v. Conrad*, 536 F.2d 1183, 1185 (7th Cir. 1976). This bar extends to jurisdictional challenges to a judgment. "It has long been the rule that principles of res judicata apply to jurisdictional determinations—both subject matter and personal." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982).

The doctrines of judicial and equitable estoppel also bar petitioners' attempt to play "fast and loose" with the courts and the parties.[12] *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 360 (3d Cir. 1996); *see also DeGuiseppe v. Village of Bellwood*, 68 F.3d 187, 191 (7th Cir. 1995) ("courts are under no compulsion to heed the shifting theories of 'chameleonic litigants' "). Here, petitioners admitted to the district

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sionals where defendants were not parties to the probate proceeding and did not represent any parties at the time the court approved the assignment).

[12] Judicial estoppel bars a party who successfully takes a position in one case and obtains a favorable final judgment as a result from later assserting the opposite of that position. *See Kale v. Obuchowski*, 985 F.2d 360, 360-61 (7th Cir. 1993) (litigant could not assert that he owned property in bankruptcy proceedings, after having previously asserted that he did not own the property while negotiating a property settlement in divorce proceedings). The elements of equitable estoppel are misrepresentation, reasonable reliance, and detriment. *FDIC v. Rayman*, 117 F.3d 994, 1000 (7th Cir. 1997); *Cange v. Stotler & Co.*, 826 F.2d 581, 585 (7th Cir. 1987).

court that "they *knew from the beginning*, even while they were urging the court to approve the settlement, that they would attack the limitation on attorneys' fees" and "contend that the 'settlement only' class was invalid." Pet. App. 20-21 (original emphasis). The district court concluded that petitioners' "conduct is a classic example of behavior which invokes the doctrine of equitable estoppel. By their affirmative acts and their silence when there was clearly a duty to speak, they intentionally mislead *everyone* in the case—the defendants, the class counsel, the court and their own clients—into believing that they approved of the settlement, including the limitation on attorney's fees." Pet. App. at 11-12 (original emphasis). *Accord* Pet. Opp. 7-8 (court of appeals opinion).

Mull argues that plaintiffs' attorneys were foreclosed from objecting to the settlement because they had a conflict of interest: the settlement was good for their clients, but bad for attorneys because it deprived them of their right to collect their contingent fees. *See* Mull Pet. 27. However, no ethical dilemma is created by a settlement proposal that does not award plaintiffs' attorneys their full fee expectations. This Court has held that even a settlement offer conditioned upon a waiver of attorneys' fees does not present an ethical dilemma "in the sense that [the attorney] had to choose between conflicting duties under the prevailing norms of professional conduct." *See Evans v. Jeff D.*, 475 U.S. 717, 727 (1986) (upholding settlement in civil rights case conditioned upon waiver of statutory attorneys' fees). The attorney must evaluate the settlement based on the clients' interests and may not thereafter seek to reform the settlement to obtain more money for himself. *Evans*, 475 U.S. at 741.[13]

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[13] Mull attempts to distinguish *Evans* by arguing that it was a statutory fee shifting case in which the fee belongs to the client, as opposed to a contingent fee case, in which Mull assserts that the

Moreover, even if the class settlement created a genuine conflict of interest—and it did not—petitioners were not entitled to remain silent. They were under a duty to tell the district court about the putative conflict before final judgment was entered. *See* Model Rules of Professional Conduct Rule 1.7 comment 2 (1995) (if conflict arises after representation has been undertaken, attorney should seek permission to withdraw from representation). Further, petitioners cannot rely on the purported conflict, which relates only to attorneys' fees, to excuse their failure to raise jurisdictional and other challenges that they now claim precluded settlement on a classwide basis.

In short, by their own conduct, petitioners are foreclosed from raising on collateral attack arguments that should have been raised before the final judgment was entered in this case. Certiorari should therefore be denied.

B. Petitioners Spece and Ibanez try to avoid the bar to their arguments by asserting that this case presents an important issue about "when attorneys fees issues are to be reviewed." Spece Pet. 20.[14] As the court of appeals

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fee belongs to the lawyer. Mull Pet. 27. However, attorneys do not have an absolute right to recover contingent fees. *See Krause v. Rhodes*, 640 F.2d 214, 219-20 (6th Cir.) (affirming district court approval of a settlement that limited attorney's fee recovery to $75,000), *cert. denied*, 454 U.S. 836 (1981). More specifically, they are not entitled to sign up large numbers of potential claimants "to secure for themselves huge attorneys' fees under individual contingency fee contracts that bear little or no relation to the actual work to be done or the risks in the case." *In re A.H. Robins Co., Inc.*, 182 B.R. 128, 138 (E.D. Va. 1995) (internal citation omitted), *aff'd*, 86 F.3d 364 (4th Cir.), *cert. denied*, 519 U.S. 993 (1996).

[14] Spece and Ibanez contend that this case presents the identical issue before the Court in *Cunningham v. Hamilton County Ohio*, No. 98-727, in which this Court will decide whether an attorney may seek interlocutory review of an order imposing sanctions. Spece Pet. 20. Spece and Ibanez also cite a purported conflict between the Third and Fifth Circuits regarding the timing for appeal-

recognized, the establishment of the $40 million cost and fee fund as the exclusive source for payment of attorneys' fees was one of the integral provisions of the class settlement. Pet. App. 5. Petitioners chose not to appeal that final judgment, which explicitly found the fund to be reasonable and fair to the class. Pet. App. 79-80. There is nothing about their tactical decision that would warrant a grant of certiorari.

II. Even if petitioners' collateral attack were not legally and equitably barred, none of their claims would warrant review. Petitioners contend primarily that the class settlement was a fraud perpetrated by fractionators in order "to manufacture federal jurisdiction over a national 'in globo' settlement" in order to "abrogate the class members' contracts with their attorneys and divert those fees to the [Plaintiffs'] Steering Committee." Mull Pet. 15; *see also* Spece Pet. 17-19. Petitioners have jumbled together jurisdictional and Rule 23 analysis in an attempt to justify raising these arguments on collateral attack. The record does not support their wild allegations of fraud.

A. As the court of appeals concluded, "[a]ll the requirements of Article III were satisfied" with respect to the final judgment approving the class settlement. Pet. App. 4. It cannot be disputed that a genuine controversy exists between HIV-infected hemophiliacs and fractionators. The class settlement was negotiated and approved in the context of multidistrict litigation that had been underway since 1993. *In re Factor VIII & IX Concentrate Blood Products Prod. Liab. Litig. (MDL-986)*, 853 F. Supp. 454 (J.P.M.L. 1993). That litigation was hotly

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ing a fee award against one defendant when there has been a Rule 54(b) judgment as to that defendant. Spece Pet. 22. These cases are obviously inapposite.

contested. As the district court observed in approving the final settlement, "[t]he docket is over 70 single-spaced pages, one indicator of the extent of this controversy." App. Pet. 72. Dozens of hearings and pretrial conferences had been held and the court had ruled upon numerous contested issues, including almost 100 discovery motions. Pet. App. 72. Fractionators had twice filed petitions for writs of mandamus challenging orders of the district court. One of these petitions led to decertification of a "negligence issue" class. *In re Rhône-Poulenc Rorer Inc. ("RPR")*, 51 F.3d 1293, 1296 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995).[15] There can be no question here as to the vigorousness with which the factor concentrate litigation had been conducted or the adverse postures of fractionators and PSC. Pet. App. 19.

The complaint in the class action asserted that fractionators were liable under a number of negligence and strict liability theories. FA 377-93. Fractionators answered denying those claims. *E.g.*, FA 458-517. The settlement proposal negotiated by fractionators and PSC was not, as petitioners allege, a fait accompli presented for the district court to rubber stamp. *See supra*, at 5-9. After conditionally certifying the class, the court held two hearings to determine whether the proposed settlement was fair to class members. FA 518, 601. The district court stated that it would reject the class settlement if fractionators were unable to resolve most government and insurer reimbursement claims against class members, deferred a final determination on class certi-

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[15] The other mandamus petition challenged a district court order relating to the number of common-issue expert witnesses upon which fractionators can call in individual trials after remand. That petition was denied. *In re Rhône-Poulenc Rorer Inc.*, No. 97-3535 (7th Cir., March 11, 1998).

fication for months pending resolution of those issues, and even entered an order stating that it would deny certification if those issues were not resolved by a particular date. FA 572-82. If the class had not been certified and the settlement approved, fractionators and plaintiffs' counsel then would have litigated this case, just as they are litigating hundreds of other cases in the MDL and in state courts.

Petitioners nevertheless assert that there was no case or controversy because the parties had reached a tentative settlement agreement before the complaint was filed. Mull Pet. 15-16. If that were the law, courts would lack jurisdiction over most consent decree litigation. *See SEC v. Randolph*, 736 F.2d 525, 527 (9th Cir. 1984) (reversing district court judgment "holding that no case or controversy existed because the parties arrived in court with the proposed judgment in hand"). Courts also would lack jurisdiction to approve settlements in cases that had been litigated for years; under petitioners' theory, courts overseeing such cases would lose jurisdiction the moment the parties came to terms. "The fact that the parties have arrived at a settlement agreement, however, does not lead inevitably to the conclusion that no controversy exists between the parties up to the time the judgment is entered." *Amalgamated Sugar Co. v. NL Indus., Inc.*, 825 F.2d 634, 640 (2d Cir.) (holding consent judgment was entitled to res judicata effect), *cert. denied*, 484 U.S. 992 (1987).[16]

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[16] The cases cited by Mull are inapposite. *See Moore v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 47, 48 (1971) (no case or controversy when both sides argue that a statute is constitutional); *Muskrat v. United States*, 219 U.S. 346, 361 (1911) (declaring unconstitutional legislation that purported to confer jurisdiction on certain courts to determine the validity of certain congressional legislation); *Cleveland v. Chamberlain*, 66 U.S. 419 (1861) (no case or controversy where appellant had acquired substantially all of

Petitioners also argue that the district court lacked jurisdiction because class representative Susan Walker stated at the final fairness hearing that approval of the class settlement was desirable because it would provide compensation to persons like herself whose claims were time-barred. Mull Pet. 22; Spece Pet. 16. This has nothing to do with the Article III case or controversy requirement. If a defendant prevails on a motion for summary judgment on limitations grounds, the plaintiff's case is dismissed; the court does not lose jurisdiction. Therefore, the possibility that defendants could have asserted limitations as an affirmative defense against Walker did not deprive the district court of jurisdiction.[17]

B. Ultimately, petitioners' Article III argument collapses into their *Amchem* claim: they contend that the district court lacked jurisdiction because the class settlement fails to meet the standards established by this Court in *Amchem*, 521 U.S. 591, 117 S. Ct. 2231. Fractionators have four responses:

(1) *Amchem* was not decided on the basis of jurisdiction; it was decided on the basis of Rule 23. This Court specifically declined to address the Article III arguments

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appellee's interest and control of the debt disputed in the litigation); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) (district court's entry of judgment in favor of named plaintiffs did not moot their private case or controversy); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 54 (1997) (no case or controversy once state employee challenging Arizona's English-only law resigned state position); *Poe v. Ullman*, 367 U.S. 497, 503 (1961) (no justiciable constitutional question absent showing that statutes would be enforced against plaintiffs).

[17] Petitioners also argue that Walker was an inadequate class representative because she was susceptible to a limitations defense. Mull Pet. 22. Here, the susceptibility of Walker's claim to a limitations defense made her typical of the settlement class. Pet. App. 70.

raised by petitioners. *See Amchem*, 117 S. Ct. at 2244. Petitioners assert that the Court may reach those arguments in *Ortiz v. Fibreboard*, No. 97-1704, and that the present case should be held pending that decision. But the outcome of *Ortiz* will not control here. In *Ortiz*, this Court is reviewing an appellate court judgment entered in a direct appeal brought by dissatisfied class members—not a collateral attack by dissatisfied attorneys.

Even if *Ortiz* were to articulate a new jurisdictional rule governing class settlements, that result would not warrant a grant of certiorari here. As the court of appeals stated: "After a case has become final by exhaustion of all appellate remedies, only an egregious want of jurisdiction will allow the judgment to be undone by someone who, having participated in the case, cannot complain that his rights were infringed without his knowledge." Pet. App. 5 (citing *Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938)). *See also Underwriters National Assurance Co. v. North Carolina Life and Accident and Health Insurance Guaranty Assoc.*, 455 U.S. 691, 706 & n.13 (1982); *Durfee v. Duke*, 375 U.S. 106, 113 (1963). Any new jurisdictional rule established in *Ortiz* could not retroactively establish "an egregious want of jurisdiction" two years ago, when final judgment was entered approving the factor concentrate class settlement.

(2) Petitioners do not have standing to argue—as they do—that certification of the settlement class violated the rights of class members under *Amchem*. A litigant may represent the rights of a third party only when those interests are similar. *See Singleton v. Wulff*, 428 U.S. 106, 114-15 (1976). Here, complaining attorneys are seeking to destroy the class settlement in which many of their clients are participating. Petitioners are representing themselves—not class members.

(3) To the extent that *Amchem* established new law governing class settlements, it does not apply to this case because *Amchem* was decided after final judgment was entered approving the class settlement. *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 95 (1993).[18]

(4) If *Amchem* applied here and petitioners had standing, certiorari should not issue to revisit the factor concentrate class settlement. As the district court concluded, this class settlement is fundamentally different from the putative class settlements in *Amchem* and *Ortiz*. Pet. App. 19. Here, the interests of one group of class members are not being sacrificed in favor of others. All eligible class members who follow the procedures for obtaining settlement payments are receiving substantial compensation—$100,000 for each claimant group. FA 8 § B. Persons who preferred to opt out and pursue individual litigation have done so without prejudicing their own interests. FA 18 § C(3)(e), 26 § F. No "futures problem" is presented because hemophiliacs who used factor concentrates during the early 1980s now know (or have it within their power to determine) whether they are HIV positive.

It is, of course, possible to question, as Judge Posner apparently does, the manner in which the settlement was structured. Pet. App. 4. Fractionators firmly believe that approval of the settlement fell squarely within the scope

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[18] Petitioners erroneously assert that fractionators "admi[tted] to this Court in their *amicus* filing in *Amchem* that affirmance of the Third Circuit's *Georgine* decision would invalidate the then pending *Walker* class." Mull Pet. 22; *see* Spece Pet. 4 n.1. Fractionators actually argued that the pending factor concentrate class settlement would be foreclosed if this Court adopted the Third Circuit rule that a class could be certified for settlement only if the class could have been certified for litigation. *Amchem* subsequently rejected that aspect of the Third Circuit's reasoning. 117 S. Ct. at 2243, 2248.

of the district court's discretion. *See Califano v. Yamanski*, 442 U.S. 682, 703 (1979). However, the question of whether the district court properly exercised its discretion is inherently factbound and does not merit review. That is particularly true here, where the judgment approving the settlement is final and virtually all class members have been paid.

C. To bolster their argument that district court jurisdiction was manufactured through fraud, petitioners make wild assertions about the settlement negotiations, the proceedings in the district court, and the manner in which settlement monies have been paid. *E.g.*, Mull Pet. 4-5, 7, 19-20; Spece Pet. 6-7, 8-10. Petitioners egregiously misrepresent the proceedings. Many of their allegations are unsupported by record citations. The court of appeals found petitioners' allegations of fraud to be "fantastic and even preposterous." Pet. App. 7; *see also* Pet. App. 3. The district court had already removed Mull from PSC for misleading class members with such allegations. FA 701-06, 709-709c. Petitioners' attempt to rewrite the history of this litigation does not deserve review by this Court.

D. Finally, petitioners allege that the releases sent to class members depart from the terms of the settlement agreement. The settlement agreement expressly provided that claimants would be required to sign releases in order to receive payment. FA 41 § M. Nevertheless, Mull points to the releases as evidence that fractionators used the cover of the class settlement to enter into thousands of individual settlements with class members. Mull Pet. 7-8. Spece and Ibanez claim that the releases actually deprive class members of consideration promised in the settlement agreement. Spece Pet. 24-27.

For the reasons stated above, petitioners do not have standing to raise these arguments. *See supra*, at 26.

Moreover, the interpretation of settlement documents is within the discretion of the district court. *In re VMS Sec. Litig.*, 103 F.3d 1317, 1321 (7th Cir. 1996) ("Given that the power to implement a settlement agreement between the parties inheres in the district court's role as supervisor of the litigation, the exercise of that power is particularly appropriate for deferential review"). The district court carefully reviewed the terms of the releases, the settlement agreement, and the final judgment approving the class settlement, and concluded that the releases were consistent with the settlement. Pet. App. 22-26.[19] The court of appeals did not find it necessary to address

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[19] The district court rejected the argument that paragraph 14 of the release shows that fractionators abandoned the class settlement. Paragraph 14 simply states that the claimant "would agree to the terms of this Release *even if* the Agreement were not part of a class settlement but rather a completely private settlement." FA 67 ¶ 14 (emphasis added). The conditional phrasing demonstrates that fractionators were not abandoning the class settlement. They merely sought protection from claimants who might collect the $100,000 class settlement payment and then attack the settlement in an attempt to obtain more money (a maneuver not unlike that attempted by petitioners).

The district court also rejected the argument that class members received less than promised under the settlement because the release waives claims against the United States and the states, a provision not contained in the settlement agreement. The United States insisted on this provision as a condition for releasing its subrogation claims against claimants. *See* FA 162, 175 at 6, § (b)(3) & App. A. Resolution of subrogation issues was a make-or-break concern for the class settlement and was specifically addressed in the notice and settlement agreement. *See* FA 572-82; FA 59; FA 46 § P. The district court found that the release provisions were "altogether consistent with the intent of the settlement agreement and cannot be regarded as a departure from its terms." Pet. App. 22. No class members objected to the waiver. Pet. App. 23. Rather, as the district court observed, "[t]he only objectors are Mull-Kozak and Spece-Ibanez, who seek to parlay the release requirement into a benefit for themselves. They completely ignore the fact that what they seek would be a substantial detriment to the class." Pet. App. 23.

petitioners' arguments about the release. Those arguments are factbound and do not merit this Court's review.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted,

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March 19, 1999

APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MDL-986

No. 93 C 7452

THIS DOCUMENT RELATES TO:
IN RE FACTOR VIII OR IX CONCENTRATE
BLOOD PRODUCTS LITIGATION

No. 96 C 5024

SUSAN WALKER, Administratrix of the Estate of
Steven Walker, Deceased,
Plaintiff,

v.

BAYER CORPORATION, *et al.*,
Defendants.

ORDER

On January 7, 1998 the court heard oral argument on the pending motions pertaining to the question of whether the Fractionator defendants can be held personally responsible for the payment of plaintiffs' attorney fees in any amount exceeding the cost and fee fund established pursuant to the Settlement Agreement and this court's Order

of May 8, 1997. Attorneys Spece, Ibanez, Mull and Kozak claim a right to enforce their contingent fee agreements against the Fractionators and argue that the Fractionators are liable to them, on various theories, for compensatory and punitive damages as well. At the conclusion of the oral arguments the court took the question under advisement and is awaiting a further brief from the Fractionators which is to be filed by January 28, 1998.

Meanwhile, the court is receiving daily communications from attorneys Spece-Ibanez and Mull-Kozak urging that the Fractionators be ordered to make immediate payment of the settlement amounts to their opt-in clients. Their position is that the Fractionators are obligated for these $100,000 payments in any event, regardless of the outcome of the fee question, and that there is no reason to delay the payments. They further request that, if the court declines to order immediate payment, it enter an appropriate order that can be appealed at this time.

Should the court hold that the Fractionators could be liable for fees over and above the amount on deposit in the cost and fee fund, there would be a serious question as to whether they could still be held responsible for payment of the full $100,000 settlement amount to a client of an attorney potentially entitled to such an excess payment. During the arguments on January 7, 1998, the court indicated its view that the fee limitation is part of the consideration for the $100,000 payments. At the present time the court sees no persuasive argument to the contrary and is unwilling to require the Fractionators to make the $100,00 payments until the court has made a decision on the pending motions relating to fees. The Fractionators are hereby excused from making further settlement payments to the Spece-Ibanez and Mull-Kozak opt-in clients until further order of court.

The request to certify this order pursuant to Rule 54(b) of the Federal Rules of Civil Procedure is denied. The court will decide the pending motions as soon as possible after receipt of the Fractionators' brief on January 28, 1997. The question of whether the Fractionators should be required to make settlement payments before their entitlement to rely on the fee limitation aspect of the Settlement Agreement has been determined is not, in the court's view, a question as to which reasonable minds can differ. Moreover, the question of whether immediate payment should be required is inseparable from the question of whether, if the Spece-Ibanez and Mull-Kozak excess fee claims are valid, the Fractionators would still be bound to make the $100,000 payments called for by the Settlement Agreement.

DATED: January 16, 1998

ENTER:

/s/ John F. Grady
JOHN F. GRADY
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MDL-986

No. 93 C 7452

IN RE FACTOR VIII OR IX CONCENTRATE
BLOOD PRODUCTS

PRODUCTS LIABILITY LITIGATION

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN F. GRADY

Chicago, Illinois
January 7, 1998

* * * *

[11] THE COURT: Okay. Now, I think we can address the matter that we set for hearing today, and what I would like to do is to ask Mr. Spece and Mr. Arceneaux to help me in my understanding of their position. I think their position is pretty much a joint position, but to the extent they differ at all, they can let me know, and I think I will ask you to respond jointly to the questions I am going to ask.

All of these questions are prompted by what I must confess is some uncertainty on my part as to what your

position is in regard to the class action settlement. In what could be something of an oversimplification but which may, nonetheless, be useful for today's analysis, I think we could regard the settlement as having two aspects.

One aspect is the payment by the fractionators of the sum of $100,000 per class member and the establishment of a $40 million cost and fee fund which I will refer to hereafter as the fund. That is one aspect.

Now, in return for the fractionators doing that, they are released from liability to all members of the class who do not opt out of the settlement and are also released from any obligation to pay attorneys' fees in excess of the $40 million [12] deposited into the fund.

Now, what I would like to ask Mr. Spece and Mr. Arceneaux is whether you regard that settlement as extant today. Is that settlement in existence today?

MR. ARCENEAUX: Good morning, your Honor.

THE COURT: Good morning.

MR. ARCENEAUX: There are 6,000 individual pending settlements, but the settlement as you described it as a class action settlement with two component parts in my view is not extant today.

What has happened is I believe the defendants have made extended offers in the notice of class, that the offers were accepted by some 6,000-odd people when they opted into the settlement, that there may have been at some point a class settlement. I am not sure that that needs to be decided.

The important point is that at some point it was clear that the defendants made a counteroffer, if you will, in the form of a release that is outside the confines of the class settlement and that those people who were signing the release are accepting that counteroffer and are settling their cases outside the context of whatever settlement class still exists, if any. That is the way I view the 6,000 pending settlements and how they will eventually resolve.

I can expound on that if you want me to explain how I come to that conclusion or if you just—

[13] THE COURT: We are going to get to that. I basically—

MR. ARCENEAUX: That is my theoretical construct for how I see what is existing right at the present time.

THE COURT: All right.

MR. ARCENEAUX: 6,000 individual counteroffers that were made and by the release, most of which are being accepted.

I know of some instances where people have indicated they do not intend to sign the release. If the defendants choose to enforce the original offer, I suppose that will be a matter that will have to be resolved another day.

THE COURT: Now, you say 6,000 counteroffers. Counteroffer to what?

MR. ARCENEAUX: Well, I do have some trouble with that because there was an offer that was made in the notice, and it was accepted by the claim form opting in. So there was a binding contract.

To the extent that under Illinois law, if it were to govern—or I know under Louisiana law, this would be possible. Even though there is a binding contract, if I as the obligor in the contract say I am not going to perform but I will offer a counter-performance, will you take that, and the obligee says, yes, I will take that counter-performance, then the original contract is reformed by what is in essence a counteroffer.

[14] That is what I think has happened here. There was a binding contract by the notice and the opt-in claim form which constituted a valid offer and acceptance. But when the release came with different terms and clearly specified that it was operating outside of a class settlement arena and asks the releasor to warrant that in signing this release he is not doing so as a settlement class member but, in fact, is expressly not relying on your Honor's May

8th order and is relying upon his own independent decision to sign this release, which means that he had no legal obligation to do it, which is what makes that clause inconsistent with the notion that there is a settlement class, under that circumstance, it seems to me that the release is a suggestion that they are still willing to perform but on somewhat different terms.

And if the release is signed by the claimant, then there becomes a new binding contract.

THE COURT: Now, how do I know that the people who signed such releases had in mind that they were accepting a new offer and that the terms of the old offer were thereby abrogated?

MR. ARCENEAUX: That is an excellent question because I am afraid there are many people who probably don't realize that. The people I have consulted with, and I know the people Mr. Mull has consulted with, and I don't know about the Steering Committee and the 800 number, but I know from seeing [15] Internet postings many people were very concerned about the terms of the release being different from the original offer. And I believe Mr. Spece has a motion pending to reform the release, and I will leave that issue up to him because none of our clients have asked us to do that.

Almost all of them are willing to the terms of the release. So I do believe there are probably people out there who don't realize that the release doesn't conform to the original offer and that—

THE COURT: Now, let's take your argument the next step, assuming for purposes of the next step that the release did constitute some different or additional offer by the defendants, or at least a modification of the original agreement.

How do we determine what aspects of the original agreement were modified or changed by the releases?

MR. ARCENEAUX: I don't think you need to because the release is a complete contract in and of itself. It states that, if I am not mistaken, in one of the concluding paragraphs.

But, in any event, the release, and it is an extensive 17, I believe, some odd paragraphs, offers the defendants all protection they need and constitutes a complete stand-alone agreement.

THE COURT: What does it say about the hundred [16] thousand dollars?

MR. ARCENEAUX: It says that it will—

Well, actually, it says several things. It says inconsistently with the notion that this is an implementation of the original settlement, it says that there will be no obligation to pay the hundred thousand dollars until this release is signed and approved, that there is no settlement until a judgment of dismissal is entered in those cases that are pending in various Courts. And as to the amount, it continues to specify $100,000 although in some respects there are some changes in the amounts which I could get into in particular.

THE COURT: What does the release say about attorneys' fees?

MR. ARCENEAUX: The release says that each party shall bear its own attorneys' fees. And then it says the defendants obligation to attorneys' fees is limited to the cost and fee fund.

THE COURT: Now, have the people who signed the releases by their act of signing agreed to those terms?

MR. ARCENEAUX: They have. Unfortunately under both Illinois law, or not unfortunately, as I view it—fortunately under both Illinois and Louisiana law, they have no ability to eliminate the attorney's right to fees.

If the defendant has offered $100,000 net of [17] attorneys' fees, which is has offered to do, I don't believe

that is in dispute, and nobody has ever suggested that the clients are entitled to less than the full hundred thousand dollars—once the liens were perfected, the defendant has no ability and the client has no ability to agree to such an arrangement where the attorney would not get paid and his funds would be limited to a single source in an amount arbitrarily determined by the defendants, or even if it had been agreed upon by the client and the defendants.

And there I use the analogy in my memo to an interpleader where the stakeholder comes into Court and deposits a sum of money and says, here, claimants, fight over this, and, in essence, the $40 million. And the cases are very clear that the claimants in an interpleader action are not limited to that fund. They can contest the fund. They can draw on the stake, but they can also countersue the stakeholder and claim that the fund is insufficient.

In effect, that is what the defendants have done. That is what the $40 million and the fee fund in my view represents. It is the attorneys' fees that they would otherwise owe, much of which is owed to the Steering Committee and class counsel for efforts conducted in connection with litigation over which the Court had jurisdiction and class counsel worked very hard for.

THE COURT: How do I know that these people—[18] By the way, I think we will go faster if you just answer my question.

MR ARCENEAUX: I will try to confine myself.

THE COURT: You will have a chance to state your position fully, but we will move ahead faster if you just give me short answers to my questions.

MR. ARCENEAUX: I will try.

THE COURT: How do I know that the people who signed these releases believe that in signing them they were abrogating the part of the settlement agreement that limited the defendants' obligation for fees to the $40 million fund?

MR. ARCENEAUX: I am not sure I follow the question, but I don't believe that their intention to abrogate that is germane to my position. They may have intended that, and if they did, that is only further proof of my state court action now pending against the defendants for interference with contractual relations.

THE COURT: What is it—

MR. ARCENEAUX: I am sorry.

THE COURT: What is it then that resulted in the abrogation of the limitation if it wasn't the intention of the releasors to do so?

MR. ARCENEAUX: There is no extant legal limitation. It is not as if—

When the defendants abandoned the settlement—and [19] these actions are now proceeding as individual settlements in Louisiana state court where all of Mull & Mull's clients' claims are pending. Under Louisiana law, when those cases settle, if there is a perfected lien, either the client or the defendant owes attorneys' fees. And the client and the defendant can't unilaterally agree to limit the defendant's liability.

So if what is being resolved here is a Louisiana state court case by the signing of this release, which the release clearly contemplates by its own terms, then this Court—any extant remnants of its May 8th order which might limit attorneys' fees doesn't apply to that because that case has been settled outside the—

THE COURT: What you are saying then is that the terms of the releases have nothing to do with Mull and Spece's entitlement to attorneys' fees beyond the $40 million fund.

MR. ARCENEAUX: Other than to the extent that the release gives rise to—for intentional interference with their contracts, that is correct.

THE COURT: So even if the releases—

MR. ARCENEAUX: Said nothing.

THE COURT: —had contained no provisions to which you now object, your position would be the same in regard to what you say is the lack of any authority to displace the contingent fee.

[20] MR. ARCENEAUX: That's correct.

THE COURT: All right. By the way, Mr. Spece, if at any time you disagree with anything that Mr. Arceneaux is saying, please indicate that; otherwise I will assume that you and he are on the same page on these things.

MR. SPECE: Your Honor, then I think it would be appropriate for me to comment somewhat on the questions you have already ventilated.

THE COURT: Okay.

MR. SPECE: Your Honor, I do agree that the original contract agreement of the class settlement does not exist. However, one of the—

We base it not only on the theory that there has been a material change in the contract and which constituted an abuse of process in the use of this—

THE COURT: Let me hold that. I am going to get into the question of what the differences are at a later point. Basically I just want to get your structural answer as to whether this agreement is still in place.

MR. SPECE: Okay. Let me then look at the other reason that I don't think was eliminated by my colleague, and; that is, that we are requesting discovery because we believe there are facts in the record that suggest that there was an improper intent from the beginning by these defendants to use this Court and the legal system to perpetuate a fraud on the [21] clients and on the attorneys who represented those clients.

This was not a bona fide expectation of a legitimate class settlement but, rather, a device by which the defendants could go directly to attorneys' clients, urge them to settle without the advice of their counsel as to strong cases, and at the same time to limit the attorneys' fees to

an unreasonably low amount, exploiting a conflict of interest that existed in the class counsel and in the inherent nature of the situation.

Now, these are serious charges. This is why we have asked for additional discovery. But we submit that the subsequent changing of the release is not divorced from this because even if your Honor doesn't accept the theory that there was an independent contract simply because of the changes from the notice of the release, this bears on the original intent.

And if the original intent was to approach the community with an offer, and then all along the releases were expected to state explicitly that you are not relying on a finding of fairness via class counsel, you are not relying on a finding by Judge Grady, and, by the way, we are going to use the attorneys' fees which the attorneys to this date could have reasonably expected would be disseminated in a fair and equitable manner and might make unnecessary additional claims for attorneys' fees in the form of interference with contract and other tort theories —if they have this all in mind—and I will reiterate; one of the mechanisms used, and it bears on [22] this question, is if you opt in all of your clients, then we will look favorably on your request for attorneys' fees.

There has been a manipulation to force people to opt in to counsel their clients regardless of the merits. And on this matter of conflict of interest, I simply want to tender, because I think the current proceedings are a microcosm of the entire litigation, and—

THE COURT: Mr. Spece, you are really getting ahead of where I want to be at this point. So let me get back to Mr. Arceneaux.

The reason I am asking these questions is that the arguments that have been submitted in the briefs are somewhat diffuse, and what I am trying to do is to crystal-

lize your positions here so that I can understand them better than I do.

MR. ARCENEAUX: I am sorry, your Honor.

THE COURT: Go ahead.

MR. ARCENEAUX: I might add to Mr. Spece's comments that he and I are not on different pages there. I think his explanation eloquently explained why the release. It is the motivating factors that supply the defendants' intent to change the deal, and I agree with him a hundred percent in his assessment.

THE COURT: Now, let me ask this. Do Mr. Mull and Mr. Spece and Miss Ibanez believe that they have any rights under the order of May 8th, 1997, or under the settlement [23] agreement?

MR. ARCENEAUX: I believe Mr. Mull's clients have rights to claims.

THE COURT: That's not what I am asking.

MR. ARCENEAUX: All right. I believe Mr. Mull has rights to assert his lien against the $40 million that is under the jurisdiction of the Court. That may or may not constitute the cost and fee fund but certainly constitutes a fund of money subject to the jurisdiction of this Court's in rem powers.

I believe that Mr. Mull has a claim against the defendants for his attorney's fees which can be asserted against that sum of money under the jurisdiction of the Court who is the only one, I believe, who can adjudicate the fate of that sum of money.

And to the extent that the defendants do not make available to him from that sum the money to pay his fees, they are personally liable for the deficiency.

THE COURT: Well, now, what is it that would give Mr. Mull a right to anything in the fund?

MR. ARCENEAUX: It is not a right to the fund; it is a right to the money that is under the jurisdiction of the Court that was—

THE COURT: That is the fund.

MR. ARCENEAUX: Well, it may sound like semantics, but I don't believe it is, your Honor.

[24] THE COURT: Well, explain that.

MR. ARCENEAUX: I believe that that fund constitutes money that at one time was to be used to pay attorneys' fees and still is presumably, that it may or may not constitute the same fund that existed and was contemplated by the May 8th order. It is still a fund of money. That fund, as a defined term—

THE COURT: Well, I can tell you this. If it is not the fund that was contemplated by the May 8th order, Mr. Mull isn't going to get any of it under any circumstances.

Now, does he claim a right to recover from that fund or doesn't he?

MR. ARCENEAUX: He claims a right to recover from the defendants who may—

THE COURT: Not from the fund.

MR. ARCENEAUX: Exactly.

THE COURT: All right.

MR. ARCENEAUX: From the defendants who may choose to satisfy that obligation out of the fund.

THE COURT: But Mr. Mull renounces any claim that he may have to share in the $40 million fee fund.

MR. ARCENEAUX: That is not correct, your Honor.

THE COURT: Well, tell me what is correct.

MR. ARCENEAUX: We have asserted a lien against that sum of money.

[25] THE COURT: Okay.

MR. ARCENEAUX: I don't believe that you can release that sum of money.

I believe that that fund, that $40 million which may or may not constitute the fee fund, is $40 million under

this Court's jurisdiction over which we have asserted, and properly so, a lien.

THE COURT: But you are not saying that Mr. Mull's claim arises by virtue of any standing he has under the settlement agreement or the order of May 8th.

MR. ARCENEAUX: Mr. Mull's fees—right to fees from the fund?

THE COURT: Correct.

MR. ARCENEAUX: As to the contingency fee contracts, his rights do not arise—

THE COURT: No, no. Just answer yes or no.

MR. ARCENEAUX: I can't.

THE COURT: Does he claim any right by virtue of a standing under the order of May 8 to claim against the fund established pursuant to that order?

MR. ARCENEAUX: I can't answer yes or no because there's two parts. I can answer yes to one and no to the other.

THE COURT: All right.

MR. ARCENEAUX: As to his individual contracts with [26] his client and the contingency fees which he claims are due, his rights do not arise from the May 8th order. They arise from operation of either Illinois or Louisiana, most probably Louisiana law.

THE COURT: All of which is not to answer my question.

MR. ARCENEAUX: It does answer your question as to his contingency contracts. As to any right he may or may not have to claim fees as quantum meruit in reimbursement for work done by the plaintiffs' Steering Committee, I suppose that would in some respects arise as a consequence of the May 8th order although I don't believe it arises under it.

THE COURT: How would it arise?

MR. ARCENEAUX: Because the Court has jurisdiction over the $40 million.

THE COURT: Is it your view that Mr. Mull would be able to claim—and it is not clear to me from the briefs whether he is claiming $33,000 or $50,000 out of each $100,000 payment. But let's assume it is $33,000.

Is it your position that he is entitled to claim 33,000 from the fractionators for each of his clients and then, in addition to that, claim some kind of quantum meruit payment out of the fee fund?

MR. ARCENEAUX: If Mr. Mull gets the contingency fee contracts, I believe that there is no question we would waive quantum meruit on the Steering Committee.

[27] But if I may add just one small point here, your Honor, in the interest of trying to shorten things. This is not really the position that I have taken in the memo, and these are not issues that we have asked the Court to adjudicate. In fact, they are issues we have asked you to refrain from adjudicating because we believe that they are improperly asserted here.

What happens vis a vis Mr. Mull's rights and the defendants is not an issue that your Honor need to be concerned with. All it needs to do is dispose of this fund. To the extent that we receive money out of the fund which we believe we are entitled to do, the defendants will then be able to use our receipt of that money as a defense in state court, and the Louisiana state court will decide whether our receipt of money from that fund is a partial release of the defendants or a full satisfaction of the defendants' obligation.

THE COURT: Let me save you time, and I will save you the time of reiterating that kind of argument which gets us nowhere.

For this settlement to proceed, the rights of Mr. Spece and Mr. Mull against the fractionators must be determined here and now. For me to leave that determination

in some other forum at some later time would be to undermine the settlement that is taking place here and make impossible its completion.

[28] So we will proceed along the lines that I have initiated here, and I hope we will get to some resolution of the question.

Now, let me ask you this.

MR. ARCENEAUX: Mr. Spece may have a point.

THE COURT: I think I am going to ask Mr. Spece to sit down, and I will hear from him after I have heard from Mr. Arneneaux. And you can make notes, Mr. Spece, as to anything you differ about.

What is the source of the lien that Mr. Mull asserts against the fund?

MR. ARCENEAUX: It is Louisiana state law.

THE COURT: Okay.

MR. ARCENEAUX: And/or Illinois law.

We have not briefed the conflicts of law issue. My initial assessment is Louisiana law, but we have perfected liens under the laws of both states.

THE COURT: Now, the fund would, I assume, without deciding, but I assume that is part of the settlement, part of the settlement proceeds, and if you have a lien, it seems to me that that would probably be assertible against the fund although I would want to hear from the fractionators on that.

Do you claim that you have a lien that extends to the assets of the fractionators beyond the fund?

MR. ARCENEAUX: This gets into a discussion I had with [29] Professor Hazard about my improper use of the word "lien." The right we claim against the defendants while I had been calling it a lien is in reality, as he points out to me, not a lien. A lien is a claim, a priority, against a specific thing. So I think I will correctly describe our claim against the fund as a lien.

I believe what I described when I talked about the defendants' personal liability is, under Louisiana law, what we would call a cause and right of action that would make them personally liable. So to describe it as a lien against the defendants may not be correct.

THE COURT: So that really comes down to your claim for interference with contractual relations or something of that kind.

MR. ARCENEAUX: It has two component parts. One is a tort claim for interference with contract, abuse of process, unjust enrichment, and the various other tort claims including fraud.

The bigger part and I think the easier cause of action to resolve is a contractual matter. As I have described to you before, it is a third party beneficiary arrangement where, in order for the client to be paid $100,000, the client has stipulated that a third party will be paid attorney's fees.

Under Louisiana law we call that a stipulation pour autri, a-u-t-r-i, stipulation for the benefit of another. In [30] that instance, the stipulator, in this case the client, has an enforceable right as well as the beneficiary to enforce that contractual obligation.

THE COURT: Now, what has the client stipulated to?

MR. ARCENEAUX: The client has demanded as a consequence of the operation of law and the settlement that the attorneys' fee be satisfied by the defendants instead of by the client.

THE COURT: But pursuant to the terms of the settlement rather than pursuant to a contingent fee contract, correct?

MR. ARCENEAUX: Pursuant to the terms of the release.

THE COURT: Well, does the release change the amount of the plaintiffs' attorneys' fees?

MR. ARCENEAUX: The client is unable to contractually do that, whether the client intends to and agrees to or not. That is the whole point of our claim; that what the defendants have done is they have attempted to limit the client's obligation to their lawyers by agreeing with the client that the client's obligation would be limited.

And under both Louisiana and Illinois law, the client and the defendants are not free to limit the attorneys' obligation by abrogating in effect between themselves the contingency fee contract that the client has with the lawyer.

So in that respect, the client's intention and the [31] language of the release is totally irrelevant because the law says those parties cannot agree to circumvent the attorneys' rights.

THE COURT: My question had to do with whether the attorneys are asserting any rights under the order or the settlement, and I think you have answered that question.

MR. ARCENEAUX: When you say the settlement, I am assuming you mean—

THE COURT: I mean the settlement agreement.

MR. ARCENEAUX: The class action itself.

THE COURT: Correct.

MR. ARCENEAUX: Their rights are arising out of 6,000 individual settlements.

THE COURT: Now, let me get to the matter of the releases. And let's take point by point those provisions of the releases tendered by the defendants which you claim, Mr. Arceneaux, effectively rescinded the settlement agreement.

MR. ARCENEAUX: If I may just make one small correction?

THE COURT: Yes.

MR. ARCENEAUX: The release I do not believe rescinded the settlement. I believe the settlement agreement was void. The release is a reflection of the settlement agreement's essential nullity.

THE COURT: Well, now, when you say the settlement is [32] void, are you talking about Amchem?

MR. ARCENEAUX: Yes.

THE COURT: That is your fundamental point?

MR. ARCENEAUX: I believe that the release is a recognition by the defendants of the essential invalidity of the settlement, the indefensibility of it. So rather than face the prospect or the inevitability that the settlement would be declared void, or recognized as void is a more correct way to express it, the defendants went ahead and took care of their own business by crafting a release that divorces this settlement from the context of the May 8th order.

THE COURT: Well, now--

MR. ARCENEAUX: Although it attempts by some of its language to still invoke the May 8th order, if it is carefully examined, provision by provision, almost every paragraph has something in it that is inconsistent fundamentally with the notion that this release is the implementation of a class action settlement.

THE COURT: Well, let me ask you this.

Let's assume there had been no Amchem decision and these releases containing the identical terms that they contain had gone out. In that event, would your position be that the settlement was still in place?

MR. ARCENEAUX: My position would be for every person who signs this release, if his or her claim with the defendants [33] would have been compromised outside of the existence of an existing class action settlement, that by signing this release, the releasor and the releasee

agreed to compromise that claim outside the scope of the settlement class.

It is clear in the release when it requires the releasor to warrant in the release that he is not relying upon the May 8th order of the Court and is making an independent decision to sign this release, that the release order certifying that he is under no legal compulsion to sign the release or to go forward with the settlement, which he would be if this were a class action.

So that paragraph 14, which is the most blatant thing in the release that is inconsistent with the settlement, underscores that for anyone who signs this document, he has compromised the claim outside the context of the settlement class. There are also other provisions in the release that I believe more subtly but, nonetheless, suggest the same thing.

For example, I don't know if it would be appropriate at this time to go through it paragraph by paragraph.

THE COURT: Well, what I want to know is all parts of the release that have the effect of voiding the settlement.

MR. ARCENEAUX: Perhaps I can articulate my position better this way.

THE COURT: Okay.

MR. ARCENEAUX: I believe the settlement was void. I [34] believe for those people who signed the release, they have indicated unequivocally that they have resolved the claim outside the context of any settlement that either exists or purports to exist.

I believe the settlement is void. I believe that signing the release indicates the intention of the parties, that they have removed their settlement from the context of any void, voidable, or even existing settlement class, that they have gone outside that original settlement and confected, in effect, a side deal, if you want to call it such, or a new deal.

And I believe the reason why this is drafted this way is a recognition on the part of the defendants of the indefensibility of the settlement class. And in order to protect their own rights, which they certainly were cautious in doing, they drafted a release that divorces this agreement from the class settlement except in one instance where they invoked the existence of the settlement class, the only place where they purport to waive the settlement class as enforcible is in the area of attorneys' fees. Everywhere else they have not done so.

THE COURT: In your view, would the defendants have been able to renounce the settlement at the point of the Supreme Court decision in Amchem on the basis that they could no longer realize the protection they thought they were [35] achieving through the class action settlement?

MR. ARCENEAUX: I think once they deposited the $600 million in the trust fund, I believe the 6,000 settlements became irrevocable. Up until that point, it seems to me there is a plausible argument they may have been able to walk away.

THE COURT: Why would the deposit make a difference?

MR. ARCENEAUX: Because the deposit places the money outside the jurisdiction of the defendants to unilaterally withdraw and inside the jurisdiction of the Court.

THE COURT: Well, but what if the defendants came in and said they want the Court to enter an order abrogating the settlement?

MR. ARCENEAUX: I believe it is contract law, your Honor. If I am a promissor in a contract, I would make a deposit to secure the contract. It is an irrevocable offer.

So when they deposited the money and created the $600,000 fund and sent out almost simultaneously the releases, they made 6,000 individual offers, each of which

are secured by some money that is now under the jurisdiction of this Court in the form of a $600 million fund.

The offer at that point, and the defendants had full knowledge of the existence of Amchem—at that point I believe they made 6,000 irrevocable offers, which I believe your Honor has the jurisdiction to enforce because it has jurisdiction over the 6,000—the $600 million fund.

[36] THE COURT: The defendants were obligated under the settlement to pay a hundred thousand dollars to each class member. That was their contract existing at that time.

Could that obligation have been increased at the instance of any class member who said that he wished to sue for more on the basis that—

MR. ARCENEAUX: An opt-in class member who accepted the original—the offer proposed in the notice.

THE COURT: Right, who now says in view of Amchem, it is my desire to sue for more.

MR. ARCENEAUX: If he doesn't sign the release—if he does not sign the release, it is a done deal. If he or she doesn't sign the release, I believe they have the ability to proceed forward with an independent—

THE COURT: So this is a unilateral situation then where the fractionators were bound once they deposited the money but, having deposited the money, would not have the benefit of a reciprocal situation as to any class member who simply decided not to sign the release.

MR. ARCENEAUX: To some extent, and I will answer generically, but to some extent the answer to that may turn on differences in state law. I don't know the law, and I assume in that instance the law that would govern, that relation would be the law in the state where the offer was received.

It seems to me under conflict of law principles, that [37] is most likely. So I can't speak of every state, but

under at least the law of Louisiana, which I do know, when a deposit is made to secure an offer, it is a unilateral one-way offer, and that is perfectly recognized by the law.

I am telling you I would give you unlimited time to decide whether you want this. If you don't find—I can't force you to take it, but if you want it, it is there for you, and I have secured my promise to make it available by making a deposit.

THE COURT: One of the major benefits that the fractionators realized in this class action settlement is their release from liability to any class member who did not opt out and who didn't file a claim either. We have no idea how many of those are, but it seems reasonable to assume there may be several thousand of them.

At various times in this litigation we have talked about 10,000 class members. We have had 10,000—excuse me—6,000 claims filed. So it could be that there is a very substantial amount of litigation from which the fractionators are now releived if the class settlement is valid and binding.

Now is it your position, Mr. Arceneaux, that assuming the notice to the class was adequate, which I think it was, that any of the possibly 4,000 claimants still remainnig would be free to sue the fractionators?

MR. ARCENEAUX: Some of them will not be able to [38] because of the way the release is drafted and the signatures that are required.

Example: I have a client in Alabama who opted in. Her ex-husband and the father of their deceased child whom she hadn't seen for 20 years did not do anything. She received a claim approval, and we expected that under the terms of the settlement as approved, she would have received $100,000 since at that point there was a claimant group of only one because her husband no longer had a

viable claim under the bar order, and the settlement agreement said that.

The release comes along and now it requires the signature of her husband, who was not an opt-in or an opt-out, but in order to get her money, she would have to sign the agreement, reducing her original entitlement to $50,000, but the defendants for that extra 50 purchasing from her husband, protection from this lawsuit.

So there are instances where—

THE COURT: Let's assume that that claim would be barred. But in a situation where there is no such signature, would a class member be entitled to file suit?

MR. ARCENEAUX: Class member. You mean a person who did not opt in or out?

THE COURT: Correct.

MR. ARCENEAUX: Yes. I believe that is a risk that the defendants undertook when they deposited the $600 million. [39] They made an affirmative determination that going forward and resolving 6,000 claims was sufficient consideration for them to incur the risk that there would be former class members who would otherwise have been barred but may now bring suit.

I might add to that that nowhere in the release does it specify as an element of consideration resolution of any claim or benefits received therefrom other than resolution of a claim by the releasor. So in this offer, to any particular releasor, it is not specified that the defendants are receiving consideration in the form of some other benefits as to other claims or claimants.

THE COURT: Well, assuming it is an offer and not part of the—

Mr. ARCENEAUX: That's correct, your Honor.

THE COURT: —class settlement.

MR. ARCENEAUX: That's correct.

THE COURT: I would like you to explain to me, Mr. Arceneaux, how the class members are prejudiced by each of the provisions of the releases that you say depart from the settlement agreeement.

Now, you have already explained to me that to the extent the releases provide that the claimants have made their own independent determination concerning the fairness of the settlement, that in your view constitutes a new agreement, and you need not repeat that.

[40] MR. ARCENEAUX: Okay.

THE COURT: What I am interested in now in this specific inquiry is any element of prejudice that the claimants would experience by virtue of having signed the release in the form that it was submitted to them.

MR. ARCENEAUX: I am going to put aside and not comment on then the provisions of the release that may be—have the same ultimate effect as the settlement but, because of the way they are phrased, actually constitute an indication that it is not part of the settlement. I am going to put those aside and only comment on the provisions which produce a different outcome. I think that is what your Honor is asking.

For example, in whereas clause number 2 on page 1, the release waives all claims for infection with HIV virus and any other viruses.

Now, I realize the fractionators will take the position, and I don't know what view your Honor has on this, that the original settlement waived liability for all contaminations from the product, whether from HIV or otherwise. The settlement agreement contains language that suggests that. But the notice itself, when fairly read by class members, and I have talked to many who read the notice and were shocked at this provision—

The notice itself, when fairly read, only contemplates release of liability for HIV infection because it talks about

[41] waiving or releasing a claim, but nowhere in the notice is the word "claim" defined. The only place the word "claim" is specified in the notice in a context is when it talks about claims for HIV infection, which leads reasonably to the inference that what is at issue is claims for HIV infection and what is being resolved by the settlement or claims for HIV infection.

So to that extent I believe that there is one instance where the release goes far beyond the context of the notice.

THE COURT: So you are saying, for insance, that the release would cover hepatitis whereas the agreement doesn't.

MR. ARCENEAUX: Or CJD or any other unknown viruses, many of which their identity is unknown, but their existence is probably certain.

MR. MAGAZINER: I think that Mr. Arceneaux misspoke. He said the agreement makes it clear that it does cover hepatitis, but Mr. Arceneaux's point is that he claims a notice doesn't make that clear.

Is that correct?

MR. ARCENEAUX: I believe the agreement arguably extends to other sources of contamination. I believe it expressly refers to hepatitis. I am not sure about that.

But I know that there are provisions that I read that arguably extend to other sources of infection, but I believe the notice is limited only to HIV because of its failure to [42] define the word "claim."

THE COURT: All right.

MR. ARCENEAUX: That is a first example.

The second example—

THE COURT: Let me ask this. How many of Mr. Mull's clients had lawsuits on file that claimed damages for—

MR. ARCENEAUX: Other viruses?

THE COURT: —infections from other viruses?

MR. ARCENEAUX: I don't know.

MR. MULL: Hepatitis and other viruses, any unknown.

MR. ARCENEAUX: I might footnote my comment about the whereas clause by pointing out that in paragraph one of the release is where the actual waiver of liability for all viruses is contained. The whereas simply says that is the intention of the parties.

THE COURT: Let me ask you to refer me to the exhibit that is the—

MR. ARCENEAUX: Exhibit number 8, the release, and the notice is Exhibit Number 10.

THE COURT: Is that contained in anybody else's exhibits? I don't seem—

MR. SMITH: Yes, your Honor. The notice is in our original motion. You will find it as Exhibit B.

MR. MAGAZINER: Are you looking for the notice or the release?

[43] THE COURT: No, no, the release.

MR. SMITH: The release, I have an extra copy if you would like, your Honor.

THE COURT: Okay. I have got your papers, but I can't find it.

MR. SMITH: The release is also here, your Honor.

MR. SHRAGER: Are you giving the Court the legal notice as well?

MR. SMITH: Yes. These are—this is a full set of our original motion with the exhibits, your Honor. The release is here as Exhibit D, and the notice is here as Exhibit B.

THE COURT: Thank you.

MR. SMITH: That is an extra.

THE COURT: Now, I think that this might be a good time for us to break for lunch. It is 5 after 1:00.

Let's reconvene at 2:00 o'clock. Okay. Will that give you time for lunch?

MR. ARCENEAUX: Thank you, your Honor.

MR. MAGAZINER: Your Honor, since many of us will have to change planes, do you expect to go until 5:00 o'clock or later?

THE COURT: I will go however long is necessary. Well, I have got lots of other things I had hoped to do today, frankly. But this has priority.

MR. MAGAZINER: Why don't we assume you will go to the [44] end of the day.

THE COURT: Assume that, but I am going to try to leave myself some portion of the day for other matters.

MR. ARCENEAUX: But after I have heard from Mr. Arceneaux and Mr. Spece, then I want to ask the fractionators and class counsel for their responses.

So I would assume, if we reconvene at 2:00 o'clock, I hope we can finish by 4:00.

MR. ARCENEAUX: Thank you.

THE COURT: I hope we can finish by 4:00.

MR. ARCENEAUX: I will try to be as brief as possible.

(The trial was adjourned until 2:00 p.m. of this same day and date.)

* * * *

[48] (The following proceedings were had in open court:)

THE COURT: Please be seated.

All right, Mr. Arceneaux, let's take up where we left off.

MR. ARCENEAUX: If I may for just one brief moment, to take a step back for a second.

THE COURT: Sure.

MR. ARCENEAUX: Professor Hazard had to leave for a rules committee meeting.

THE COURT: I didn't even know he was here. Was he here this morning?

MR. ARCENEAUX: He was sitting in the back.

THE COURT: I would have said hello if I had seen him. I heard you mention his name, but I didn't realize he was here.

MR. ARCENEAUX: He had intended to address some of these questions. Unfortunately—maybe if there is additional briefing, he might be able to do so. But he did discuss with me at lunch that perhaps I had not made our position clear on one matter. So I would like to do that, to see if I can make the record very clear because I think it probably is of consequence.

In response to your Court's question about whether Mull was waiving claims against the $40 million, I think it is perhaps best appropriate to describe our position with regard to that twofold.

[49] One, we have claimed against the defendants, which is payable out of the fund, and your Honor can order the defendants to pay that claim out of the fund because the fund is a res under the jurisdiction of the Court.

THE COURT: Now you say you have a claim, though. But I want to know the basis of that.

MR. ARCENEAUX: The basis of the claim is what I explained with regard to contractual claim, the stipulation pour autri theory and the tort, et cetera.

THE COURT: But you are not saying to me, Judge Grady, your order of May 8 says that attorneys who rendered services on behalf of class members are entitled to be compensated out of this $40 million fund, and we are invoking that provision to claim fees from that fund.

MR. ARCENEAUX: The issue that was raised by the defendants was whether we were entitled to claim money in excess of the fund.

THE COURT: No, I am not asking you what they are saying. I am asking you what you are saying.

MR. ARCENEAUX: My argument is we have a right to be paid. The basis of our claim is the contracts with our clients and the effect of those contracts under both Illinois and Louisiana law.

THE COURT: Is the answer to my question no?

MR. ARCENEAUX: I am not sure. I think we are not—[50] I need to explain the second part of the argument and I think that addresses the question in toto.

There are really two issues. One is we have a claim against the defendants. The claim is payable out of the 40 million or otherwise. Your Honor has jurisdiction to adjudicate that claim as relates to the 40 million because it is a res in the control of the Court. Your Honor doesn't have jurisdiction to adjudicate that claim outside of the $40 million, and that is all predicated upon there being no settlement class.

If we are wrong about there being no settlement class, of course, there is a $40 million fund and we don't waive our right to participate in the fund, which right may be based either on contracts, which your Honor then admittedly would have more power to adjudicate and perhaps even abrogate in toto, assuming that the fees were to be proved unreasonable.

I am still not sure I am being as clear as I perhaps should be, but I think that is the best I can do.

THE COURT: Your claim under the order of May 8, to the extent you assert one, is strictly a fallback position in the event I disagree with you that there is no longer any settlement pending before this Court on a class basis.

MR. ARCENEAUX: Yes. It is an alternative claim. Does that—

THE COURT: All right, okay.

[51] MR. ARCENEAUX: When we discussed this at lunch, Professor Spece has a slightly—some nuances to

add to it, and I think it might be appropriate if you heard, just so that we can make—

If there are any distinctions, I think it would be appropriate.

THE COURT: I am not going to hear from everybody under the sun this afternoon. I don't have time to do that.

MR. SPECE: Your Honor, I have some very different—

THE COURT: I am going to hear from you, Mr. Spece, because you are a claimant here, but I am not going to hear from every kibitzer who might have flown in here today. I just don't have the time. With all due respect to anybody who is interested in the proceeding, I just don't have the time.

MR. SPECE: Your Honor, could I then at this point illuminate my theories?

THE COURT: No, because I am going to hear from Mr. Arceneaux. I am going to give him about another 10 minutes or so. Then I am going to hear from you at length, Mr. Spece.

MR. SPECE: All right.

THE COURT: Or whatever length is necessary for you to add to anything that Mr. Arceneaux has said. Okay.

MR. ARCENEAUX: I believe where we left off was you were asking me for differences between the release—

THE COURT: Prejudice.

[52] MR. ARCENEAUX: Only the ones that involve prejudice to the client.

THE COURT: Prejudice.

MR. ARCENEAUX: I had started with the first observation being the scope of what in effect was released.

I went back at lunch and studied the notice again just to make sure I had not missed anything, and the only thing that came to mind or that popped out at me was,

in the definition of the settlement class, it defines class members as those persons with HIV or who also contracted hepatitis or any other infection. But it still doesn't change my view just because they are defined as a settlement class member that the settlement effects a release.

I also notice under page 3 of the release—no, I am sorry—page 4 under "rights and options A," it says this will end all of your claims against the fractionators concerning any alleged contamination of factor concentrate.

Arguably, I guess, under a construction, that would include all claims for all sources of contamination. But I continue to believe, after discussing this with numerous clients who were outraged that the release expressly referred to HIV and other viruses, that this was not what was understood by many people who viewed this notice.

And, of course, I will remind your Honor of the rule that notices are one of the things that are subject to the most [53] strict type of construction there is under law. So many people—I couldn't go so far as to say most—but many and the ones I have consulted with did not view the notice as calling for settlement of any claimants with HIV infection.

Another prejudice to clients under the notice and/or the settlement vis a vis the release is the question of indemnity. The settlement agreement says that it is the intention of the parties to do everything possible to protect the defendants against third party claims.

The release itself specifies that if the defendants are sued by a third party, that—and in the event that the releasor recovers and the releasor—the third party has a claim against the releasor, then the recovery of the original releasor is reduced to the extent of that third party claim.

So, in effect, it is indemnity, which is not included in the original settlement proposal. I think that is a signifi-

cant prejudice for those people who were choosing to pursue third party claims.

THE COURT: I am sorry. I am not sure I followed that. Will you do that again?

MR. ARCENEAUX: Okay. Perhaps if I referred you to chapter and verse, it might be—

THE COURT: Okay.

MR. ARCENEAUX: Exhibit 9 of our papers is the settlement agreement, and number N in Exhibit 9, which is on [54] page 40, is the provision on contribution, and it says the parties intend the fractionators obtain total and final peace, and it goes on to say they intend to exercise their best efforts to obviate the necessity and expense of the fractionators appearing and defending.

The release, rather than simply saying we intend that this work out, expressly imposes on the releasors an indemnity obligation; that in the event that the fractionators are sued by a third party under a third party claim and are found liable, the releasor's recovery is reduced by the extent of that third party liability.

So even though the release purports to reserve all claims against third parties to the released parties, it in reality doesn't because if they sue a third party and the third party sues the fractionators, the hundred thousand dollars must be used to satisfy an indemnity obligation.

THE COURT: Now, how many of these releasors are suing third parties?

MR. ARCENEAUX: As far as—

THE COURT: How many of the releasors

MR. ARCENEAUX: Mull & Mull, we have the original plaintiffs who filed suit in Louisiana state court of which I think seven accepted the settlement, and they all have third party claims pending against Tulane University Medical Center. So all of the original seven Louisiana plaintiff Louisiana [55] state court cases would be subject to that.

THE COURT: What is the basis of their suit against Tulane University?

MR. ARCENEAUX: Medical malpractice.

THE COURT: Is that where they got their concentrate?

MR. ARCENEAUX: Critical care center at Tulane.

THE COURT: What is the status of those?

MR. ARCENEAUX: I do here comment that Tulane has not third partied the fractionators, and that is true. Tulane has not third partied the fractionators.

THE COURT: There has been no judgment entered against Tulane.

MR. ARCENEAUX: No.

THE COURT: What is the status of the case against Tulane?

MR. ARCENEAUX: The seven cases pending in Louisiana state court in Judge Tobias' Court, the civil district court of New Orleans, he set the first trial for November of this year. Tulane had pending motions to be released on statute of limitations. I think he is going to hear those in—is it July?

MR. MAGAZINER: Your Honor, I think we may be off on a little bit of a tangent. These are opt-out cases that Mr. Arceneaux is describing.

MR. ARCENEAUX: There are seven opt-in cases. [56] MR. MAGAZINER: You are describing cases that Judge Tobias has set for trial, and the cases Judge Tobias has set for trial are—

THE COURT: Obviously are not opt-in cases.

MR. MAGAZINER: I think we can refine this a little better.

THE COURT: Except that they could be set for trial against Tulane.

MR. ARCENEAUX: And will be if there is no exception of prescription resolved in July.

MR. MAGAZINER: There are cases pending only against Tulane now?

MR. ARCENEAUX: They are cases pending against Tulane and the defendants which are still extant because the releases have not been approved. There is no judgment of dismissal, and exception of prescription was filed by Tulane, I believe July is the date. I could be wrong about that.

If Tulane is not dismissed, the case will proceed to trial against Tulane even if the defendants are dismissed, but Tulane has not filed a third party claim against the defendants. I believe I have correctly summarized that.

THE COURT: All right.

MR. MULL: Yes.

THE COURT: Now, how many Mull clients are there all together?

[57] MR. ARCENEAUX: The opt-ins?

THE COURT: Right.

MR. ARCENEAUX: There are 318.

THE COURT: So out of 318 there are seven who have third party claims.

MR. ARCENEAUX: The remaining cases, none have sued third parties.

THE COURT: Now, —

MR. MULL: If you include the NHF as a third party or if you include the Red Cross as a third party, there are other lawsuits.

MR. ARCENEAUX: That is correct. I am sorry. I forgot about that.

Can you tell me any more?

MR. MULL: There are 130 people that have opted out.

MR. ARCENEAUX: Opt-ins.

MR. MULL: I don't know.

MR. ARCENEAUX: I can supply that to your Honor.

THE COURT: No, I just want round numbers.

So there are 130 additional people with claims against opt-ins with claims against—

MS. GOURLEY: No.

MR. ARCENEAUX: No, no.

MR. MAGAZINER: Those are opt-outs that Mr. Mull is describing.

[58] THE COURT: Opt-outs I don't want to hear about.

MR. ARCENEAUX: There were 318 opt-ins. There were—there are seven of those that were—they are Louisiana plaintiffs. They were the original suits. Those all have third party claims against Tulane.

Of the remainder, those are all pending in Louisiana state court in a couple of different forums. Some of them have asserted claims against the NIH. Some of them have asserted claims against the state of Louisiana for Angola prison plasma, I believe 120 at least.

MS. GOURLEY: Opt-outs.

MR. MULL: Those are opt-outs.

MR. MAGAZINER: Those are opt-outs.

MR. ARCENEAUX: There are some opt-ins that you may not know about, but they are there—

THE COURT: Well, could the fractionators be liable for prison plasma obtained directly from—

Who would have been the supplier of the—

MR. ARCENEAUX: They contracted with Angola state prison to buy the plasma.

THE COURT: I see, okay.

MR. ARCENEAUX: I wish I could give your Honor numbers. I can supply—

THE COURT: My question really doesn't depend on numbers.

[59] My question is this. Assuming an opt-in releasor who has and intends to have no third party claim, has there been any prejudice there?

MR. ARCENEAUX: No. If they don't sue a third party, there is no prejudice.

THE COURT: All right, go ahead.

MR. ARCENEAUX: The next one would be indemnity. I am sorry—subrogation.

The original settlement offer under my reading makes very clear that it is the fractionator's obligation to resolve the subrogation problem. The release in two ways shifts that burden onto the settling parties.

THE COURT: Let me ask you to address this, and it is based on my recollection. We were, of course, concerned with the major subrogors, the Medicare—Medicaid people and the insurance companies. I can recall quite distinctly having discussions here in open Court, or maybe it was on a telephone conference, about the fact that there would be corner drugstores and physicians and all kinds of people as to whom it would simply not be feasible to try to get releases of any subrogation claims, and I think that what we decided was that would simply have to be the class member's responsibility to deal with as it might arise.

MR. SMITH: Your Honor, you addressed that at the November 25 fairness hearing.

[60] THE COURT: What did I say, Mr. Smith?

MR. SMITH: You said exactly what you just said now.

THE COURT: All right. Now, I thought I would bring that to your attention, Mr. Arceneaux, so you can address it.

MR. ARCENEAUX: I apologize for not being aware of those discussions.

What I am aware of is the provisions of the notice which say the settlement is conditioned on resolving issues relating to reimbursement and subrogation claims that might possibly be asserted.

THE COURT: All right, to resolving issues.

MR. ARCENEAUX: But the fair construction of that for the claimant reading this notice is that if the issue is not resolved, there is no offer. So I am not going to have to pay it. That is the way that the—

THE COURT: Well, I suppose that interpretation is consistent with your position, but I am not sure I see it is justified.

MR. ARCENEAUX: Another—well, there is another way, I believe, and I just may finish this, on the question of subrogation, that the agreement shifts the responsibility of subrogation although most of the subrogation claims have been resolved. Efforts were done to do that successfully.

There are some pending, but even for those that were resolved, part of the cost of that was shifted to the releasors [61] by the provision in the release that waives liability for the United States and any political subdivision, which apparently was part of the price of buying a waiver from the United States government.

But it seems to me that that was a price that the defendants should have had to pay either in additional cash, or somehow making the releasors waive that claim does not seem to me to be contemplated by the settlement, nor is it anywhere contained within the notice.

Then there is the issue of actual dollars that some people may receive, and I alluded to this before. The original settlement agreement in paragraph F-5 makes it very clear that in the situation I described, where you had a claimant group with some people who opted in and other people who did nothing, that in the event that the class was certified and your Honor entered a bar order, as he did, that the person who opted in would receive the whole hundred thousand dollars. That is paragraph 5 under F.

The release is completely different. I have two cases personally that I know of, and I have heard of many others, one of which I believe class counsel knows about because he consulted with him as well, where there were members of a claimant group who opted in and other members who did nothing. The defendants were requiring signatures from the people who did nothing, which means that the money has to be split among [62] people and sharing in people who did not opt in.

And we have asked for a waiver at least as to the client I represent and have not been able to receive it, and I understand Mr.—class counsel asked for a waiver on behalf of the other case, and I understand he was not able to receive it either.

So in some instances, the requirement of signatures which has been described to me by one of the defendants as the suspenders in the belt and suspenders they say they are able to wear actually impinges by reducing the amount that otherwise, if it was an extant class, people would be entitled to receive as a consequence of the bar order.

There are other minor distinctions, but I think those are probably the major ones.

THE COURT: Now, to the extent that you represent people of that kind, have you given any consideration to coming before me and asking for relief because I will tell you right now, unless there is a very good reason for somebody who has not been interested enough to opt in to share in the settlement, I would want to know why such a person should receive a share?

MR. ARCENEAUX: Why they should receive a share?

THE COURT: This goes to the question of prejudice. It seems to me that I am a full-time employee of the federal government here available for—

[63] MR. ARCENEAUX: I had considered—

THE COURT: —for any assistance that I can render in this thing.

MR. ARCENEAUX: I had considered it, and while I am a little concerned about disclosing why I did not because some of it involves my own legal theories, one was that the recommendation I received from the defendants and through a client that I discussed this matter with, who had discussed it with class counsel, was your only recourse is request a waiver, which I did do.

But in my waiver letter, I clearly said we will not sign the release unless you grant the waiver because—

THE COURT: I would not permit blackmail. I will tell you that, and what you are describing is a blackmail situation. And to the extent that you have permitted that to happen to your clients, that is your fault.

MR. ARCENEAUX: Well, the other reason why I have not approached the Court is because I am not sure the Court has jurisdiction to resolve that issue.

THE COURT: I have jurisdiction over this class to the extent that there is a class.

MR. ARCENEAUX: To the extent there is a class.

THE COURT: But, of course, if you say that I lack authority to grant you help, then—

MR. ARCENEAUX: In the particular—

[64] THE COURT: —then you can lift yourself by those bootstraps to the top of this building.

MR. ARCENEAUX: In my particular case, it is not a problem, your Honor, because my client wants to sue the defendants. So failure to get a waiver on her behalf is actually not going to be an issue. I don't know about other people. The client I refer to is not interested in—

She requested a waiver, it was denied, and she has made alternative decisions.

I believe those outline the salient points of prejudice.

THE COURT: Al right, thank you.

MR. SPECE: I can address it.

THE COURT: Yes, sir?

MR. SPECE: Do you have further questions for Mr. Arceneaux?

THE COURT: Yes. I want to run through these points with Mr. Arceneaux, and then I will get to you.

THE COURT: Let me ask the fractionators how many checks have been sent out.

Out of the 6,000 that—

MR. SMITH: Your Honor, as of the end of the year, approximately 17,500 have been sent—1,700—I am sorry —1,750 have been sent out. I suspect knowing what was sent to MetLife, since then I would suspect by the end of this week, we [65] will be about 1,900.

THE COURT: Okay.

MS. GOURLEY: There is a more current report, Jeff.

THE COURT: That is close enough. I just wanted round numbers.

MS. GOURLEY: It is approximately 2,000, your Honor.

THE COURT: Let me ask this, Mr. Arceneaux. Approximately two-thirds of the money has not yet been disbursed.

Is it your position that notwithstanding what you say is the destruction of the class settlement by reason of Amchem and other circumstances that you have mentioned, the fractionators would have no basis to ask me to terminate further payments from the funds that have been deposited for payment?

MR. ARCENEAUX: They would perhaps have a basis, but I can tell you—I think what your response should be.

You have the fund under your jurisdiction, and you can preserve it because there are irrevocable offers pending, that if the fractionators retreat from after being accepted, those claimants have an absolute right to prosecute in state court where their cases are pending, or if they had no cases pending, to file a suit in state court, to recover that money.

And your Honor can enter an order saying upon presentation of a judgment from a state court or any other [66] Court saying there is a completed settlement, the money will be released. You have control over that res, and you can preserve it so that those settlements, when confected, will be ultimately concluded.

THE COURT: You think that the correct ruling on such a motion, should one be presented, is that the motion should be denied, and I should require that the payments continue to be made to the claimants.

MR. ARCENEAUX: Yes.

THE COURT: Now, this is notwithstanding the fact that the fractionators in your view have essentially lost the benefit of their bargain in the class settlement; namely, they lost the release that they though they had obtained against liability to any class members who have neither opted in nor out, and they have lost their immunity from liability for attorneys' fees beyond the $40 million in the fund.

So as you see the fractionators' picture, it is a disaster for them, isn't it?

MR. ARCENEAUX: On August 15th—

THE COURT: No, don't tell me about August 15th.

MR. ARCENEAUX: I am not going to argue about it. I think—

THE COURT: Tell me about January 7th.

MR. ARCENEAUX: I think they made a very unwise decision when they were notified on August 15th of this

Amchem [67] problem, that they decided to go forward with the settlement and deposit that money on the 29th, which indicates their acceptance of the risk that they may be exposed to those claimants who did not opt in or opt out.

They elected to proceed, and it was a strategy that they made after being fully made—fully informed of the Amchem problem, and our intention to assert this lien issue including its Amchem underpinnings; they went ahead with this and deposited the money.

Having done that, they have made 6,000 irrevocable offers, and the consequences of that which may be a disaster for them or may be manageable—I am not sure—are a risk that they must bear. The release itself says no error of law will void this release.

THE COURT: No person who has opted into the settlement has moved to set it aside on the basis of Amchem. On what basis would I hold that the settlement is invalid under Amchem, which I have read the same as you have? On what basis would I do that?

MR. ARCENEAUX: Well, just to set the record straight, there were people who complained, but they dropped their complaint when they were allowed to opt out, but they are not before the Court.

The basis of my complaint is that under well established constitutional law, and the Supreme Court [68] jurisprudence, and the Seventh Circuit jurisprudence interpreting, particularly the Kamilewicz case, any infirmity in jurisdiction or in due process is—renders a judgment void and can be raised in any proceeding even in a collateral matter when the existence of that judgment is asserted to deprive someone of a right.

Amchem—I am sorry.

The settlement order is being raised in this proceeding to deprive my clients of a right. They have a right to

attack it collaterally in order to defend their right to receive their fees.

THE COURT: Mr. Mull is going to be contending, I take it, that he did a great deal of adversarial type work connected with these MDL cases, isn't he?

MR. ARCENEAUX: He has submitted hours. I don't know how many.

THE COURT: And all of that preceded the settlement, didn't it?

MR. ARCENEAUX: There were class—there were hours that were after the settlement. He worked extensively on the medical needs trust. But as far as litigation hours,—

THE COURT: This was a hotly contested litigation, wasn't it, before the seven—

MR. ARCENEAUX: Yes.

THE COURT: Such that the fractionators thought it [69] appropriate to deposit as much as $40 million to compensate plaintiffs' counsel for work necessarily and reasonably done in connection with the litigation, very little of which would have to do with processing of the settlement, correct?

MR. ARCENEAUX: I have a different take on why they did that. I mean, I can offer you my theory.

THE COURT: You are not saying it is too much money, are you?

MR. ARCENEAUX: That the 40 million is too much? No, it is too little.

THE COURT: Why is it too little?

MR. ARCENEAUX: I think that they offered the 40 million because it was enough to make it impossible for class counsel or anyone else to launch a serious objection without sounding greedy. If they could have offered less and gotten away with it, I think they would have. But I think they picked that figure because it sounded to the

community like a whole lot of money, and if anybody had said—

THE COURT: Let me cut that off because that is really a different subject.

MR. ARCENEAUX: But I think, your Honor, that gets to—

THE COURT: Let me ask this. Let me ask this.

In light of the events that preceded the unexpected settlement in this case, do you think that the facts of Amchem, [70] with which I assume you are familiar because you cite the case so often, are distinguishable from this one in terms of whether this class settlement can be upheld?

MR. ARCENEAUX: I think the facts of the Amchem settlement and this settlement are distinguishable.

I think under the paradigm of controlling law announced by the Supreme Court, this case is worse than the Amchem settlement. It has more infirmity and is subject to greater constitutional effects.

THE COURT: Give me just two examples of that.

MR. ARCENEAUX: Two examples are the lack of commonality between these class members which the Seventh Circuit had already adjudicated, which was certainly not the case in Amchem. And that was the first branch of what John Coffey has called the two legs of Amchem, the lack of commonality and the lack of adequate representation.

I think this case fails commonality more than the Amchem class did given the Seventh Circuit ruling, which I didn't agree with, but given its existence, it seems like we have to take it for a given.

Number two, the inadequacy of representation, which is what Mr. Coffey calls a second leg of Amchem. To me, and I am loathe to—it is unconscionable that this settlement provided that these class members could ask

tne Steering Committee for advice as to whether to accept this offer or not, and if they [71] did, they would not be liable for attorney fees. Yet if they consulted their own attorneys or any other attorney, they had to bear their own cost.

That equipped the Steering Committee with a method to, in effect, ensure that most people would be relying on the Steering Committee's advice.

THE COURT: It also avoided unnecessary attorney fees, which is the reason I approved that aspect of it.

MR. ARCENEAUX: I don't believe they were unnecessary attorneys' fees because of the commonality problem. In the original June 4th hearing when this issue was discussed, your Honor went on record, and correctly so, being very concerned that no position be taken by the Steering Committee as to any particular case because the facts were too much in dispute. And class counsel agreed with that position and said: I think all we can say is consult your own attorney.

Then when you look at the release, the release says we have approved the settlement and we think it is fair. And then in the next paragraph it says but there are many facts in dispute. You may do better in your own case, you may not do better, we can't tell you. And then in a third place in the notice, it says you don't need an attorney to fill this out.

Now, to me all that in toto means there were many people who signed this notice relying upon the assessment by somebody that it was the best that could be done. It was a [72] good deal as to their case. It may have been the best that could have been done for the whole community, but as to any one particular person, and in some respects this ties commonality with adequate representation, that assurance could not be made absent an attorney

who studied the facts of that case and the law of that state where that case would be tried.

THE COURT: Did those aspects of the matter have any bearing on any of Mr. Mull's opt-in clients?

MR. ARCENEAUX: Were Mr. Mull's opt-in clients influenced by the Steering Committee?

THE COURT: Were they prejudiced by anything that you have just mentioned? In other words, did they lack adequate advice as to whether they should opt in or out?

MR. ARCENEAUX: Every single one of them consulted with Mr. Mull, and he reviewed every case. I don't know how many of them he recommended opt in. I know there were some that opted in over his recommendation.

There were many things on the Internet undercutting his ability to advise his clients. There were repeated postings saying don't—basically don't trust your own lawyer. I am paraphrasing there, but that was the import of many of the postings. It kept talking about professional responsibility, and if in doubt, get it in writing, phrases such as that.

I can't say how many people disobeyed his advice. Some people opted in over his advice, and I don't know the [73] reason.

Dovetailing into the ability to recommend people who essentially were not common and had no commonality is the motive to do so and indeed the obligation of the Steering Committee to do so. And this is a—this is a quandary. Class counsel was in, and it is built into this. It is inherent. It is no one's—the motive is not the issue; it is the design of this, which is the defendants' fault, in my view.

Class counsel—

THE COURT: Let me ask—

MR. ARCENEAUX: May I?

THE COURT: No. I will ask my next and near final question because I want to get to Mr. Spece.

I would like your response to this question which troubles me in regard to your entire position. Without the limitation of attorneys' fees to a separate fund, there would have been no settlement here. The only settlement that I was ever asked to approve and the only one I ever indicated I would give any consideration to approving was a settlement that would yield $100,000 net of attorneys' fees to each class member.

Now, Mr. Mull and Mr. Spece sat back and watched that settlement take shape, did not appear at the fairness hearings to object, filed no written objections, and permitted the Court, counsel, and members of the class to proceed with a settlement that was premised absolutely on the proposition that [74]there would be no attorneys' fees payable in any way whatsoever except out of the $40 million separate fund.

Now, having observed that process go forward and yield a settlement that has resulted in an enormous amount of money, Mr. Mull and Mr. Spece now say we want I am not sure how much money, but we want our contingent fee contracts honored because our clients have been paid or will be paid $100,000 each.

Now, Mr. Arceneaux, you have used the words—I am not sure which words you have used, but they were synonymous with unconscionable in referring to the fractionators. Tell me why what I have just described is not unconscionable.

MR. ARCENEAUX: I have two point to make about that.

First, I think it is—to assume that there would have been no settlement absent the $40 million—

THE COURT: You are looking at the fellow who knows whether there would have been one or not, and I am telling you there would not have been.

MR .ARCENEAUX: Your Honor, that is an assessment of the chancellor's foot kind that Amchem says you shouldn't have had to make. You were put in the most difficult position of everyone here. You were asked to assume as a given what the defendants were telling you without ever being able to know if this process had negotiated through, without the class vehicle, what the outcome would have been. The process was started, and a deal was actually—settlement documents had been [75] circulated.

But, in any event, I don't want to confine my argument to the facts because I don't think—it is not the basis of my argument. I think the important point is that you were asked to assume as a given that there would have been no settlement, and there was no one in that courtroom to challenge that assumption for you.

THE COURT: You could have done it, or not you, but Mr. Mull could have done it. Mr. Kozak could have done it. Mr. Spece could have done it. None of them did.

MR. ARCENEAUX: No, your Honor, and this is why I call this settlement unconscionable.

By releasing this settlement to the Wall Street Journal before the offer was made to individual attorneys, the community knew $100,000 had been offered. There were clients who wanted to accept that money. Mull & Mull were prohibited from—

THE COURT: I will tell you that for sure.

MR. ARCENEAUX: They could not have attacked that settlement.

THE COURT: The mail I got in favor of the settlement from members of the class was almost unanimous in favor of it, with a few very notable exceptions.

MR. ARCENEAUX: As evidenced by, I guess, the small number of opt-outs that remain. I think it is only about 300. [76] I am not sure.

But the point is Mull & Mull could not have attacked the settlement without incurring some problem with the clients that it had that wanted to opt in. So it made the conscious election relying upon federal jurisprudence, since it had not been cited, it had not been served, it had not been named as a defendant or as a class member, that if it stood by and let this class be certified, if certification became a problem for it, that at the appropriate time, it would have the absolute right under federal law to raise whatever issues it needed to raise when it was appropriate to defend its rights and its own clients' rights were no longer in jeopardy. That is the reality.

THE COURT: So you are saying that they had the intent all along, Mr. Mull had the intent all along to challenge the settlement once it had been effected?

MR. ARCENEAUX: They had the intent all along to collect their contingency fees.

Of course, we all assumed, and I extensively discussed with Mr. Mull before Amchem that it seemed inevitable to me that Amchem would be resolved the way it was, especially given the Seventh Circuit's approval of Judge Becker's rationale in the Kamilewicz case.

But, in any event—

THE COURT: Mr. Mull felt no obligation to advise the [77] Court, for instance, if no one else, that he was not amenable to what the Court clearly thought was an indispensable part of an agreement that fees would be limited to the 40 million fund?

MR. ARCENEAUX: He couldn't. If he could have done that, he would not have been serving the interests of his clients that wanted to accept the settlement.

THE COURT: Except that these issues go to the fairness of the settlement. He had an obligation to his clients to raise each and every objection to the fairness of the settlement, and what we have been talking about here is whether the settlement was fair.

MR. ARCENEAUX: They go to the fairness vis a vis the attorneys but not as to the clients.

THE COURT: Except that what you have been talking about in terms of Amchem here for the last 15 minutes all goes to the question of whether the settlement was fair to the clients.

MR. ARCENEAUX: They go to the issue of whether or not the Court could be assured, given the lack of commonality and adequate representation, that the settlement was fair as to any one particular person.

As to many people, there are those who could say, and in some cases I may even say, although I have not seen those cases, that as to any particular person, it may have been fair.

The way this thing was designed, it was to silence [78] dissent. No one was in a position where they could come forward and realistically oppose this settlement.

THE COURT: This is about the most cynical description I have heard in a long time of the legal profession. I will grant you that a lot of the criticism we get is warranted, but what you are saying here is that for the past year or so, what we have been doing is engaging in a process that all the lawyers involved in knew was wrong, and they were doing it to line their pockets.

MR. ARCENEAUX: I don't know about all the lawyers. I know from my perspective when I became involved—

THE COURT: All the knowledgeable lawyers, which I assume they all are.

MR. ARCENEAUX: I am not going to say that other people were not knowledgable. I am only going to speak for myself and my client.

From my perspective, the minute Amchem came down, we began to shout from the rooftops that this was fatal, that there was a serious problem.

THE COURT: Except you knew—you say you knew how it was going to come out, and I will grant you that handwriting was not entirely—was not entirely illegible. Why didn't you start shouting long before the decision?

MR. ARCENEAUX: Because until the decision did come down, people weren't listening to us. They were saying—

[79] THE COURT: Let me interrupt for just a minute. Are the people here on the TRO?

Call that case.

(Brief interruption.)

THE COURT: Thank you, counsel, for abiding the interruption here.

Have you ever heard of equitable estoppel?

MR. ARCENEAUX: Equitable estoppel, absolutely.

THE COURT: Do they have that in Louisiana?

MR. ARCENEAUX: We don't in fact. We call it something different, but the principle is the same.

THE COURT: The principle is the same.

MR. ARCENEAUX: The U.S. Supreme Court has said—

THE COURT: Does that seem to you to have any possible relevance to this situation?

MR. ARCENEAUX: Absolutely not, your Honor, and I will tell you why. There are three reasons.

One, because the U.S. Supreme Court says knowledge of a proceeding—if you know about it, if you sit in the courtroom and you are not cited, served and named, you have no obligation to intervene, you have no obliga-

tion to speak up. That is number one, and that is the big reason.

Number two. In this particular circumstance, these attorneys could not serve their clients who wanted this hundred thousand dollars and object. They absolutely could not do it. [80] That is reason number two.

And reason number three: In every way that it was possible for them to reasonably object and shout, although their shouts could only be timid, but in ways that they could shout to make this issue known, we tried to make it known. And the fact that people were not listening to us until now doesn't mean we have provoked this crisis.

It means only now is when our position, which was asserted as early as July of 1997, when I filed in Louisiana state court the DS class action and sent the defendants a letter saying: You have got a problem. Your federal class is in serious doubt. Louisiana statutes specifically allow settlement classes. Move your settlement down here, and you can do your deal in a way it can never be challenged. They ignored that request and went forward in federal court.

Then again on August 15th, 1997, when Tom Mull wrote to them and said you have got a problem. You are dead in the water under Amchem. What are you going to do? And 15 days later, they deposit this money.

If there is an inequity here, it is because they chose to ignore the warning signs and now have committed themselves to a course which will happily benefit the community by guaranteeing to those 6,000 people who want their money, their hundred thousand dollars, and will probably allow those people who did not accept that offer or those who choose not to sign [81] that release to look elsewhere for their recovery, but which also has the effect of leaving this up to state law in the matter of attorneys' fees.

THE COURT: Thank you, Mr. Arceneaux.

MR. ARCENEAUX: Thank you, your Honor.

THE COURT: Mr. Spece, let me hear from you on additional points. I will assume that unless you specifically say otherwise, you join in everything that Mr. Arceneaux says.

MR. ARCENEAUX: I would like to add.

THE COURT: Unless you want me not to. But I don't want you to repeat what he said. That is the point.

MR. ARCENEAUX: To the exhibits that are attached to my memorandum, I would like to add one more.

THE COURT: Sure.

MR. ARCENEAUX: This one illustrates, I believe, unfortunately, the extent of the conflict of interest that class counsel has found itself under.

THE COURT: Give it to me.

MR. ARCENEAUX: It is a letter to me dated November 20.

THE COURT: Hand it over here. The reporter is doing other things.

What do we call this?

MR. ARCENEAUX: It will be number 21, I believe.

MR. SPECE: Your Honor, I want to address something [82] that I think has been lost, and that is—there has been talk about additional briefing.

The way this arose was a motion by the defendants to ask you to change your mind as to your statements in a prior Court proceeding in which you said the Arizona plaintiffs should be paid regardless of the legal theories that are being asserted by their attorneys.

You said earlier today you would not countenance blackmail. Well, if that isn't blackmail, I don't know what is, what they are saying is.

Not only that, we will go ahead and pay Mull & Mull's clients, but we are not going to pay Rose Ibanez and Roy Spece. I submit the reason that is is because I think we

are smaller, we have far fewer clients, we have fewer resources. The idea was let's pick on the little guys, and then it will be a precedent.

And I would urge your Honor to order today, because daily the damages are accruing and the wedge is drawn deeper between our clients and ourselves because their moneys are being held up and they are being told by Mr. Higgins it is because we have asserted a lien.

We are not asserting a lien against the moneys to the client. We made that very clear. Indeed, the defendants asked your Honor to make an order and then withdrew it, arguing that you had already made this clear that the Arizona clients should [83] be paid. That is how the ball got rolling, and then there were subsequent motions.

I would ask your Honor to rule today because we have told our clients that we will be coming in here and that you would likely opine on that issue.

THE COURT: Let me explain the reason for the delay. While you are quite correct concerning what I said, I hadn't bargained on the continued existence of this controversy among all of you as to whether the fractionators faced a possible additional liability beyond that that is specified in the class settlement. And I think it would be unreasonable to require them to go ahead and pay class members and then face further financial liability based on those payments.

That is why I wanted to hold this hearing today, and that is why I want to get this thing decided, so that the fractionators will know, at least as far as I am concerned, whether they are or are not subject to the possibility of such further liability.

But until I have entered such an order, I don't think it has been unreasonable for them to hold up on payments to the—to your clients. As I understand it, they have not held up on payments to the Mull clients.

But, anyway, go ahead.

MR. SPECE: I hope your Honor does not link the issues of the legal arguments that the attorneys make as to their fees [84] to the payment of the clients. We contend those are two separate issues.

Now, let me start with the last question that you asked Mr. Mull. You said: Well, shouldn't there be equitable estoppel? These people sat back and allowed these proceedings to go forward.

I participated in settlement negotiations. Mr. Shrager and several other members of the Steering Committee and some friends of the committee were present, and I remember distinctly Mr. Shrager saying the offer by the defendants is unethical, it is a conflict of interest, the fees are way too low, and they cannot stipulate to the $40 million fund.

He realized the conflict of interest, but he resolved it in favor of the clients because they had exploited a situation. As Mr. Arceneaux has stated, they made an offer to the community that forced the lawyers to accept an agreement which provided for inadequate fees from the get-go.

THE COURT: Mr. Spece, I don't understand why you did not consider it your obligation to the Court who, after all, had a duty under the law to make a finding as to whether this settlement was fair—

MR. SPECE: Your Honor, we did.

THE COURT: —to inform the Court that you—

MR. SPECE: Rose Ibanez and Roy Spece did.

THE COURT: —thought it was an unfair settlement.

[85] MR. SPECE: Roy Spece and Rose Ibanez did.

THE COURT: When?

MR. SPECE: We filed—before the settlement hearing, we said that there was a conflict of interest. The fees were inadequate, and it was improper, but we would

waive the objection on the assumption and to the benefit of our clients that this Court would make an equitable distribution of attorneys' fees and considering the contingent fees and the effort of all concerned.

THE COURT: You have difficulty—

MR. SPECE: We brought that to the attention of this Court.

THE COURT: You have difficulty thinking of the interests of your client as distinguished from your own pecuniary interest. When I refer to the question of whether this is a fair settlement, I mean whether it is fair to your clients.

Now, I don't specifically recall your complaining about the fees, but—

MR. SPECE: Your Honor,—

THE COURT: —it is unlikely that I would have thought $40 million was inadequate to cover all possible reasonable fees here.

But did you ever call to my attention?

MR. SPECE: Yes, your Honor. We argued that $40 [86] million was inadequate. Mr. Shrager—

THE COURT: Will you listen, please?

MR. SPECE: Yes.

THE COURT: Did you ever call to my attention any unfairness to the clients that you see in this settlement?

MR. SPECE: Your Honor, I don't think you can divorce the clients from the attorneys because, as you pointed out, if the MDL attorneys aren't paid, will future victims be represented by people? Will future consumers be represented? This is a systemic problem.

This sole focus on the client, this is litigation. This involves the clients and the attorneys, and attorneys will not represent consumers and clients unless they are paid. And many of these clients want their attorneys to be paid. And if they thought their attorneys were going to get an

inadequate compensation, they might not have participated.

But I am just telling you we brought it to this Court's attention. We said we would not raise this, but that was before subsequent developments which showed—suggested that the defendants never intended to have a legitimate class action.

And as to that, we have asked you to take jurisdiction because we wanted to bring it to you in light of subsequent developments if you are willing to give us discovery and have an evidentiary hearing on our issue. We have said in our [87] pleadings we—you have jurisdiction over the res, but we will submit ourselves to the personal jurisdiction of the Court. We want this Court to litigate this. We want this Court to give us discovery. We want this Court to make a decision because we think this is a knowledgeable Court and a fair Court.

Now, that—

THE COURT: Let me ask you this. You think that the minimum fee you should get as to any of your clients is the amount of your percentage fee, whatever that is, is that correct?

MR. SPECE: Let me then go into my theories which would say how much we feel that we are entitled to.

THE COURT: Okay.

MR. SPECE: Now, one question you asked, is there liability arising from the May 8th, 1997, order. I say yes on several theories.

One, if there still is a class, then we submit that we can make a claim on the fund based on the reasonable value of our services.

THE COURT: There is no question about that.

MR. SPECE: We should not be forced to waive our argument by business coercion or blackmail or coercion by saying—and give up every other legal theory that you

have, including a theory for defamation perpetuated by these defendants, as we have brought to your attention in the [88] Mr. Murphy case and the letters that occurred from that.

But from the—

Your Honor had an obligation. We had an obligation. Both sides of the litigation had an obligation to this class or these—or this community when the offer went out pursuant to your order. And that offer must be construed by what would reasonbly be expected by the offerees, which were both the clients and the attorneys or the clients and the attorneys as third party beneficiaries.

And what was that offer? The offer was you will get $100,000 net, and the attorneys will be paid a reasonable value for their services considering the existence of contracts as well as the value of the services everybody contributed to the effort.

THE COURT: Now, where did the notice or anything else say considering the existence of contracts?

MR. SPECE: Your Honor, this is where the defendants weren't going into this blind. We have talked about Amchem, but Georgine existed from the get-go here. The defendants knew very well that they were taking a substantial risk, and certainly this Court could not have intended that they would send out a notice pursuant to his order, and then if Georgine came down, they could back out, when the notice itself that was sent after approval said nothing. It said there were certain contingencies, but it didn't say but if Georgine comes out and [89] Anchem and gets reversed, forget the whole deal is off, and they can walk away.

No. They knew—you participated in this, and I participated in this, that when those notices went out pursuant to this May 8th order, that an offer was made and it would be construed by how a reasonable person would interpret

it, and that is out. I have ventilated what reasonable person would see, that they would get $100,000 and their attorneys would be paid a reasonable value.

THE COURT: Out of the $40 million fund. And I—

MR. SPECE: Yes, yes. Okay, that is our one theory, your Honor.

Now, I just want to tell you our other theories.

THE COURT: Okay.

MR. SPECE: Secondly, when the releases came out, everything changed. We had said we would waive our objections and submit it to the jurisdiction of this Court and seek quantum meruit or the reasonable value of our services, hoping the Court, and we urged the Court to look at the contingency contracts.

But when they changed the deal to the detriment of our clients and to our detriment and concomitantly started saying, if you opt everybody in, we will take care of you on your attorneys' fees, but if you don't, we will question every little red cent and you are probably not going to get much, [90] then we knew that either they never intended this deal to go through or they were using the auspices of this Court and the purported class action for coercion and their own benefit.

THE COURT: Now, here, let me interrupt right there. If you were told by anybody on the Steering Committee or class counsel at that point that your fees out of the fee fund would be affected by whether you induced your clients to opt into the settlement or not, that is something that should have been brought to my attention. I would regard that as misconduct.

MR. SPECE: Your Honor, I didn't say class counsel. I am saying the defendants had said this, and we did raise this in the last hearing. We told you that Mr. Berkman has been telling us this, and Mr. Shrager basically echoed what

I said, and Fran Phares is here. And she is another person to whom he has said this.

THE COURT: I can tell you that it's not going to work.

MR. SPECE: Your Honor, what we are saying is given—

THE COURT: Mr. Spece, to the extent that I end up making a determination of what a reasoanble fee for a particular attorney is in this case, it will in no way depend upon whether that attorney has advised a particular number of clients to opt into the settlement, at least from the standpoint of whether that was something the defendants wanted or not.

[91] Now, it could be that the amount of work involved for the attorney may have had something to do with whether somebody opted in, but I would think that would be a very small amount of work. And I can't imagine Mr. Berkman coming before me and saying Mr. Spece is not entitled to more than X dollars because he only opted in 20 clients.

MR. SPECE: Of course he wouldn't say it, your Honor.

What he would say is if you didn't opt in, what he thought you should have opted in, then your hours and fees will be subject to excruciating examination and detail and you will be punished that way.

But the larger theory, you Honor, is that when they made a substantial—

THE COURT: But my statement that I want to make now for your benefit and for the benefit of anybody who reviews this record in any connection is that that won't work. I have a job to do here and I am going to do it.

MR. SPECE: But, your Honor, your job is not solely to steadfastly stand by a class settlement if the defendants have deviated from the notice and indeed repudiated your

findings because their release says you do not rely on any class settlement, you do not rely on a finding by Judge Grady, you would have entered into this whether or not there ever was a class action.

What I am saying is that gives you a predicate to [92] enforce these contracts to say whatever the defendants intended from the beginning, even if they didn't have a fraudulent intent from the beginning, they have clearly undertaken a risk and now are trying to exploit it. And I am not going to lend the auspices of this Court to such inappropriate behavior. I am going to enforce the contracts; that is, people can accept the settlement.

And in this circumstance, we feel your Honor should enforce the contingent fees and shouldn't say, oh, and what about the poor fractionators; there is going to be a failure of consideration. They have inappropriately tried to use the auspices of this Court and the law of this land, and you should not countenance it, and you should not worry about them losing some benefit of the bargain. That is—that is our second theory.

Now, our third theory is the fraud theory from the get-go which we need discovery on, and, finally, affirmative misconduct, the coercive behavior by Mr. Berkman and the fractionators, who—Lory Barsdate is here—sent a letter to your Honor by a Mr. Murphy, which we feel was intended to further discredit us, to suggest that we had told a disproportionate number of our clients to opt out. We are not telling them of their chance to opt in.

Your Honor, we filed papers—

THE COURT: I remember that.

[93] MR. SPECE: We negotiated with the defendants in Arizona and told them, look, let's put this off because this client is going to opt in and we have told them. So they knew we were telling people and they knew that Mr. Murphy wasn't told because they were saying he is not

eligible because he lost on appeal. So we didn't tell him because we didn't want him to get his hopes up and then dash them against the wall, as so often happened to this community and would happen if your Honor didn't enforce these contracts regardless of what the attorneys are saying.

They knew that Mr. Murphy was not being told because he had not yet been said to be eligible by us, but they knew they were telling other people. Why did they have this sent out, nevertheless, to your Honor? Because they want to punish us. They want to punish us because we are not going along with the program.

We are saying whether there was a deal in the beginning, a legitimate intent is a big question, but there has been a substantial deviation. Your Honor shouldn't tolerate it. Your Honor shouldn't become a part of it. And they want to shut us up.

That is a serious allegation, but if your Honor takes jurisdiction over this and allows us to do discovery, we will prove to your Honor that they knew that these were completely unfounded allegations. And your Honor knows from the letters [94] that we sent, and now we can say it in open Court we gave excruciating detail and long letters every time our clients had to make a decision, and it was made known it was their decision, but we gave them all the parameters.

Okay. The next question: Could the defendants renounce the agreement? Mr. Arceneaux says not once they deposited the money. I say once they sent out the notices because, once again, the notices they knew about Georgine, they knew the risk and they had many things to gain regardless.

THE COURT: Do you mean releases or—

MR. SPECE: The notice. The notice itself says—

THE COURT: The class notice that was sent back.

MR. SPECE: That is what the people get. That is the community. That is your Honor's sanctioned communication to these people. People, here is the deal. And this is like a prospectus. It should be treated with even more sanctity than a prospectus in the securities area, which is strictly construed.

And it is saying to these people here is the deal. It says nothing about the defendants can walk away if the Supreme Court decides to affirm Georgine and Amchem.

THE COURT: So the fractionators needed to be notified as far back as when class notice went out that they were exercising or that they were engaging in a waste of time because—

[95] MR. SPECE: Not a waste of time, your Honor.

THE COURT: —to the extent that they thought they were going to limit fees to the 40 million fund, they were whistling Dixie.

MR. SPECE: First of all, they should have never done that. That was an unethical exploitation of a conflict of interest which Mr. Shrager waived only because of the benefit of his client. He said we all have to fall on our swords for the benefit of the community. But it was an unethical thing for these defendants to do, and you keep saying, oh, they have lost the benefit of this bargain, that was not a proper bargain, that was an exploitation, the kind of exploitation that Amchem says is unconscionable.

But they didn't stop there, your Honor. They knew the risk. What did they benefit from? They want these cases to go away. Why do you think they are trying to defame us and tell people that we opted too many people out when we really opted as many people—

First of all, we don't opt them out. They make the decision. You know that from the letters we have sent to you. So the defendants didn't just get a limitation of

attorneys' fees; they have gotten rid of a lot of cases, and they went directly to the clients without the advice of their attorneys. And many of those people opted in when their attorney said don't opt in. That is the benefit to these defendants, the [96] idea that they have lost all consideration.

Your Honor, if you enforce these contracts as individual settlements without giving them punitive damages, then your Honor will be doing them a big favor and they are walking away really cheap.

The next question: How did the deviations in the release from the notice hurt the defendant? Okay. They said—

THE COURT: Hurt the claimants.

MR. SPECE: Hurt the claimants.

First of all, you waive your right against the government. It didn't say that in the notice. Why does that matter? They even said in their briefs we had to pay the government 30 million. Well, that is 30 million that was owed to the community. They are telling you that this was something of value and they had to buy it. But they took it away from the community because the notice said you can still sue the government.

Now, why does that matter? Because in trying to negotiate Rickey Ray, some legislators and government bureaucrats are influenced by the idea, albeit somewhat remote, that people will sue the government and can sue the government, and I will vote for Rickey Ray because now maybe we won't get sued. That has gone bye-bye unless your Honor does what we feel is the right thing, and that is reform these releases to [97] comport with the notice, the notice that you approved, the fairness and what you found to be fair.

If you allow them to deviate like this, then they have done a bait and switch, and they have used the auspices of this Court.

What else? The lien. True, your Honor, you did say, and it is true, there will be some pharmacies and this and that, but we are talking about substantial liens. It says here the attorneys. Once again, we have theories that go beyond that.

If your Honor doesn't take jurisdiction, we will tender jurisdiction. But if your Honor finds that he doesn't have jurisdiction as to Mull's client, as to these theories of fraud, these tort theories, we intend to pursue this in another forum.

Now, what the release says is that our clients will indemnify the fractionators. So what this release is saying —what the notice said is there will be no more obligations because of attorneys' fees.

Now, what the release says is if we sue them—if Rose Ibanez and I sue them for the defamation on our character per say by making that false allegation or republishing an allegation that they knew was not true and then that is construed as attorneys' fees, they can seek indemnification from our client. That is not part of the notice but that is [98] in the release.

So those, your Honor, are the—Mr. Arceneaux mentioned some other items, but those are very significant items, and we made a motion formally before this Court to reform the releases to comport with the notice, to provide that government actions can still be brought and to abrogate this idea that they can seek indemnification by those who might seek attorneys' fees from them.

Can the fractionators back out? Now, that is what you said.

THE COURT: Excuse me just one minute. I have to get some ink for my pen. I will be right back.

(Brief interruption.)

MR. SPECE: Your Honor, shall I proceed?

THE COURT: Yes.

MR. SPECE: Can the fractionators back out now? No, because of all the theories and arguments that I made to this date, your Honor should not let them back out and walk away from those who haven't been paid.

And Mr. Arceneaux said, well, people could present state court judgments. We feel this Court has the jurisdiction to adjudicate those claims because these defendants used the auspices of this Court, got approval by this Court, sent out a notice on approval of this Court. And even if it is not a class settlement, it is certainly settlements with those [99] people. And your Honor can adjudicate it right now and they can't back out given the facts as they really are.

Can you say that the class action doesn't exist as of this date? Yes, indeed. Although Rose Ibanez and Roy Spece said we waive the objection and the settlement is not fair, our position is actually that Wadleigh v. Rhone-Poulenc is res judicata. It decided that the criteria for the class action could not be met.

Amchem says that the same criteria for a class settlement must be met—a class settlement has to be based on the same criteria as a litigation class. You could say that Walker is different, but it is not. The name is different. There's some nuances, but this is just a continuation and it is really res judicata.

And I do agree with Mr. Arceneaux that that—it is void, that it could be attacked. It is a matter of subject matter jurisdiction, and for this very reason, the defendants are not raising this against people. We had one person who could not get their lien resolved. She is proceeding with her individual case.

There were people who appealed to the Seventh Circuit, and they said, no, we will let you off the top. They are not raising this because they know it is the fact.

Well, what about then the next question? What about work that was done before the class was certified and if the [100] class is decertified? Well, your Honor can certainly, because this is a—even if it is not a class settlement, given everything that has gone down, given your Honor's participation, and the defendants invoking the auspices of this Court and then deviating from what this Court approved, certainly has jurisdiction to treat the attorneys equitably and dispense the moneys that are before the Court and then leave for another day any claims in addition to that that might exist at the end of the day before your Honor.

If there are no further questions, your Honor, that is all I have.

THE COURT: All right. Thank you, Mr. Spece.

MR. SPECE: Thank you, your Honor.

THE COURT: Mr. Arceneaux.

MR. ARCENEAUX: Just one footnote to Mr. Spece's comments because I think it is important.

He mentioned the fact that the defendants are not raising the class as a defense. I mentioned earlier the DS class action in Louisiana. There certainly would have been the opportunity there for the defendants to waltz into Louisiana Court and raise an exception of res judicata or to seek an injunction from you shutting us down, and they chose to do neither.

Instead they removed it to federal court under a questionable theory of removal, but, nonetheless, it was [101] removed. And before Judge Berrigan could remand it, still no objection of res judicata and no injunction. It has been transferred to your Honor, and so now we will be reasserting our motion to remand, and it will be interesting to see whether the defendants place before your Honor a defense of res judicata, whether they really believe in their settlement because that is the next battleground where the Amchem question will be litigated.

Thank you, your Honor.

THE COURT: Now,—

MR. MAGAZINER: Your Honor, that is just so—

THE COURT: That is also a case in which the plaintiffs claim there is no diversity, isn't that true?

MR. ARCENEAUX: The plaintiffs claim no diversity. The plaintiffs claim there is fraudulent joinder because we name as class representatives people from other states other than Louisiana. There is a diversity issue there.

There were two grounds for removal: Lack of diversity and this res judicata exception to the federal—

But they have not raised, and the point I wanted to make is they have not asserted anywhere in that proceeding that your Honor's May 8th judgment is a bar to that suit. They have only argued that the May 8th judgment gave rise to your Honor taking jurisdiction over that suit, and it will be interesting to see whether they raise before your Honor the May 8th [102] judgment and test whether or not, when a client asserts it, that judgment is binding.

Thank you, your Honor.

THE COURT: All right, thank you.

Mr. Magaziner, or whoever wants to go first.

MR. MAGAZINER: I was just going to respond on that one point, that I think, your Honor, there is so much that has been said both in the brief and during Court, maybe before the fractionators respond, if we could have two or three minutes just a caucus among ourselves about how to proceed, it might be helpful.

THE COURT: Well, here, why don't we recess until 4:00 o'clock. It is 12 minutes to 4:00. Is five minutes enough?

MR. MAGAZINER: Five minutes will be plenty for us. Will your Honor want to hear first from Mr. Shrager?

THE COURT: I don't care. I will hear whoever wants to speak on behalf of the fractionators and on behalf of the plaintiff class.

MR. SHRAGER: Fine.

MR. MAGAZINER: Thank you, your Honor. Five minutes.

(Brief recess.)

THE COURT: All right, who wants to go first?

MR. MAGAZINER: I think I have been elected to do so, your Honor.

THE COURT: Okay.

[103] MR. MAGAZINER: Yesterday we received Mr. Arceneaux's 48-page brief and 20 exhibits, including a very lengthy affidavit making all sorts of factual assertions which we believe to be false. Today many, many things were said in Court which we think range from inaccurate to blatant falsehoods.

THE COURT: Let me interrupt just a moment. This may account for some problems I was having earlier in the afternoon. I didn't get a copy of anything that Mr. Arceneaux filed yesterday. I have got all kinds of stuff that you filed.

MR. ARCENEAUX: You didn't get something that looked like this from Federal Express?

THE COURT: Let me look at them.

MR. ARCENEAUX: We sent them all Monday night by Federal Express. I packed the envelopes myself.

MS. GOURLEY: I didn't get mine either.

MR. ARCENEAUX: She didn't get hers either.

MR. SMITH: Mine arrived late in the afternoon, but they were marked for afternoon.

MR. SHRAGER: Nor did I. I got a document with a brief and exhibits. It came late in the afternoon.

MR. ARCENEAUX: The exhibits were not attached to yours. I sent the exhibits to the depository and Ms. Nast. We ran short of sets. I was late in the evening. There was nothing I could do. I apologize for that.

[104] (Brief interruption.)

THE COURT: All right.

MR. ARCENEAUX: You may keep that copy although it has got some marks.

THE COURT: You keep it. It is around here someplace. It just hasn't come through to me. I usually get it not even necessarily the day it is filed. So I will read it. I will read it before I rule on these motions, but now I understand why I didn't have the exhibits you were referring to.

Okay.

MR. MAGAZINER: What I was going to say, your Honor, is the situation is evolving very rapidly. Among the things we learned from Mr. Arceneaux's brief is that Mr. Arceneaux and Mr. Mull have apparently sued the fractionators in St. Taminy Parish in Louisiana for $15 million, or something like that, which they think is the amount of money we owe them for the contingent fees. Mr. Spece has filed some new liens as of yesterday.

What I am leading up to, your Honor, is we would like an opportunity, not very long, to submit in writing our response to some of these things that have been said and that are being done.

THE COURT: All right.

MR. MAGAZINER: And if your Honor wants to defer your ruling until you have received our response, that is fine. But [105] we would like—

THE COURT: Well, I think—

MR. MAGAZINER: —to correct the record.

THE COURT: I think I would like to read everything that has been filed.

Then if you think the best way for you to respond is in writing, that is all right because basically what I have done today is to pinpoint things that were of special interest to me that weren't necessarily dealt with in exactly those terms by the parties.

MR. MAGAZINER: If I may share our concern?

MR. SPECE: Just a point of clarification?

On the issue of paying the client in Arizona, since everybody else is being paid, do you still assert that you are not going to pay?

MR. MAGAZINER: As I understand your Honor's ruling, you have said that you believe that it is reasonable and appropriate for use to withhold payment from clients whose lawyers are telling us that every time we pay $100,000 to a client, we thereby incur an obligation to pay another $50,000 to the lawyer.

THE COURT: I do think that is reasonable, and anything I have said previously to the contrary—

MR. SPECE: Is it going to be on a selective basis?

THE COURT: —was said without adequate consideration [106] of the exposure that involves for the defendants.

Now, why have you gone ahead and paid Mull's people and not Spece's people, though, in light of your caution?

MR. MAGAZINER: I think perhaps we should not have been paying Mr. Mull's clients.

The reason was, and I am not sure we have been entirely consistent, it looked to us originally like Mr. Spece had come closer to perfecting a lien than Mr. Mull had done at that time. And we weren't sure what our rights—

None of us on the defense side have ever been in a situation like this where we are being told by a lawyer,

pay my client, he wants a deal. If you pay him, you owe me another $50,000, 50 percent more than you agreed to pay him, and we are demanding both that you pay us, pay him, and that you acknowledge having—and if you do pay him, it is a recognition of our lien.

Whether we have acted entirely consistently, I don't know. If I had been the only lawyer involved, I think I would have said to Baxter, let's not pay Mr. Mull's clients and let's not pay Mr. Spece's clients and let's have Judge Grady resolve this. But we have not been entirely consistent. We will try to be consistent from this point forward.

MR. SMITH: We will be, your Honor.

THE COURT: Now, let me ask whether you wish to address the points that I have discussed with Mr. Arceneaux and [107] Mr. Spece in writing or whether you merely wish to respond to the matters that are set forth in Mr. Aceneaux's memorandum.

MR. MAGAZINER: Your Honor, I think what we would like to do, if it would be acceptable to the Court, is wait until we have a transcript and at least we do—

We are concerned that, as your Honor adverted to, there may be some further review of this matter, and we would like the record to contain our response to some of the things that have been said about our clients and about us.

THE COURT: All right.

MR. MAGAZINER: We would like to have the transcript so that we can see what was said. So much was said, and we, I am afraid, do not have accurate notes.

As to the legal questions that your Honor asked, we would be happy to respond to them in writing if you would like us to. I and my colleagues would be happy to answer any questions that you have of us right now, if that would be helpful to the Court. We want to do whatever is most helpful.

I think some of the questions are questions which we probably don't need to answer at all. We do believe there is a valid class settlement. We do believe that that settlement survived the Amchem decision. We think that settlement is extant. So those are some answers to the most fundamental questions your Honor asked.

THE COURT: The things that I am perhaps more [108] interested in than anything else insofar as the arguments made by Mr. Mull and Mr. Spece are concerned have to do with those provisions of the release which, arguably, go beyond what was specifically spelled out in the settlement agreement. I am not saying that they do or they don't, but I would like to have the fractionators' response to whether they do or not and then, secondly, your response to the suggestion that if they do, this vitiates the class settlement.

MR. MAGAZINER: I think your Honor certainly knows what our bottom line response is. We think we still have a valid class settlement that your Honor is overseeing at this point.

We will be happy in our response to take Mr. Arceneaux's points point by point and any additional points that Mr. Spece made and respond why we do not think the release deviates in any material way from the settlement agreement or the notice that accurately described the settlement agreement.

THE COURT: All right. Then why don't you do that. And I will read Mr. Arceneaux's memorandum that was filed yesterday, and I will read what you file when you file it. Then if I want further oral argument, which I doubt, but if I do, I will arrange to set a date that is convenient for everybody.

MR. MAGAZINER: May we have perhaps five days after we receive the transcript?

[109] THE COURT: Well, yes. I think you will need longer than that.

MR. MAGAZINER: I am told I am being too ambitious. Two weeks after we receive the transcript.

THE COURT: All right, figure a week from now for the transcript, and two weeks thereafter, 21 days from now. So that would be—

MR. MAGAZINER: The 28th.

THE COURT: 28th, all right.

MR. MAGAZINER: Thank you, your Honor.

THE COURT:,Further memorandum.

Now, Mr. Shrager, do you wish to respond?

MR. SHRAGER: Well, first, if there is any question in particular, any area in particular, that you would like me to address, I would prefer to talk about what you want to talk about rather than what I want to talk about.

THE COURT: Well, I would like to hear your reaction, since you are representing plaintiffs, I would like to hear your reaction to my suggestion that there is something unfair to the fractionators about what Messrs. Mull and Spece are proposing here.

Now, you have not been someone who has been notably sympathetic to the fractionators throughout the life of the litigation, and I would be interested in your view of what I have described as their predicament.

[110] Is it a predicament or would it be a predicament if I should adopt the views of Mr. Mull and Mr. Spece, or would it instead be something that they have brought on themselves as is suggested?

MR. SHRAGER: Would there be a predicament for them? Certainly.

Would it be one from which they could obtain legal relief? Perhaps.

Did they get the benefit of the bargain they supposed under at least the landscape as painted by Mr. Arceneaux? Absolutely not.

There is a larger problem, though, that I have, sir. Class counsel are here today. Jim Green, Dianne Nast, and myself are here really representing a group of persons who would be in a state of uncertainty, the great majority.

There are about more than 5,000 sets of releases that have been mailed. You heard earlier that about 1,700 or 1,800 claims have been paid. Perhaps closer to 2,000 would be within the next week or so. We have an ongoing obligation to the class members, the majority of whom have not yet been paid then, who have releases in place.

Mr. Arceneaux's argument presumes that there are irrevocable offers of settlement out there. That may or may not be true. He did not explain what would be the legal constraint on the defendants for a settlement that is not part [111] of a class action settlement except he continued to—he called it an irrevocable offer. He said it was an offer. He called it a counteroffer. It is a very arguable point.

What are the legal rights of these people? Is there an offer, as he supposes, or would most observers or at least Courts say that if there is no settlement, there is no settlement either way? At least it should be admitted that these are very serious questions.

So the rights of the largest number of members of the class would be left with uncertainty. That is not satisfactory. There is not the slightest doubt that the agreement negotiated, approved, presented, drafted in great detail, including, we learned from Mr. Mull's time records, hundreds and thousands of hours that he himself says was put into this, was a class action settlement.

I mean, are we in Chicago? Is your name Grady? Is my name Shrager? This was a class action settlement.

Everybody knows that. And I do not shrink for one minute—perhaps the fractionators do—I do not—in supposing that somehow the Amchem case flaws this. I have never thought that. As a matter of fact, I think it fits like hand in glove because what Judge Posner said was that the order, he called it—I forget the phrase but I quote the Seventh Circuit—was usurpative because of three points, each one of which is definitionally obviated by the settlement, and that is number one. There [112] would be a jury of six or eight people who could reach this judgment and bankrupt the defendants, definitionally gone when you have a settlement.

He said, secondly, there would need to be an esperanto —he called it pejoratively—he said an esperanto definition. He did not recognize commonality or, for that matter, typicality in the respective issues of negligence and standard of care. He said nuances could be important. He said a lot of other things.

But they had to do with trial management issues, exactly what the United States Supreme Court said was important in terms of considering a settlement because you don't have trial issues when you have a settlement.

And, third, there was the 7th Amendment question, which was the other big ticket item in the Seventh Circuit's mind in the respect of a second jury re-examining the verdict of a first. In other words, how would you bring the case to a judgment on all issues?

It is precisely on that point, your Honor, that the United States Supreme Court modified, modified, the Third Circuit ruling and said settlement is pertinent and must figure into the equation of evaluating whether Rule 23 has been complied with.

So we concede nothing about Amchem. No one has—everyone has proceeded today. Of course, the fractionators

[113] have not had their say as yet on this. Everyone has proceeded as though we need to be defensive.

This Court approved a settlement within the four corners of the law as it existed at the time and as it existed after Amchem. But the important point was made by the Court earlier, and; that is, there is nothing in Amchem that says that a class action settlement is not worth the paper it is written on. If you have a claim against it, you appeal. You cannot lie and wait. You cannot stand silent when the rights of class members are at stake.

The reason for rules of appeal and time limits is so that the rights of parties can be settled. And at the district court level, there is a time limit because its decisions may be reviewed. There is no appeal that is pending, none, none. That is first principles. There is no appeal.

What are we talking about here? There are some arguments that were made that I am personally very sympathetic with, but we have an obligation to the class. And these issues were presented, they were argued about, an agreement was negotiated, and we are told again by Mr. Arceneaux's client that he, as much as anyone, was involved in the settlement, was one of the parents of the settlement.

And you recall, Judge Grady, when you asked Mr. Mull about what you had heard, that there were these town meetings, that he was undermining the settlement, he wrote to the Court [114] on March 5, 1997, and he described the background of the settlement, and he said that early April, referring to April of 1996, at which time members of the Steering Committee were brought in to finalize the details of the offer, these efforts ultimately culminated in the proposal which was formally presented to you, a proposal in which he tells us in these papers and in his affidavit he was conspicuously involved.

And then he continues—I am at the second page of his letter:

"As you may recall from my comments at the fairness hearing, my only reservation regarding the fairness of the settlement was that it be concluded in a timely fashion."

Now, the important point here is not whether in retrospect things could have been done differently, whether the offer crafted by the defendants was very clever in terms of setting the amount of the attorney's fee. I in part agreed with what the professor from Arizona had to say about that. I thought he made some astute points.

But the fact of the matter is that a deal was done and concluded and it was advertised and it was approved, and parties actively participated. Your Honor will recall that Chuck Kozak very vigorously participated in one of the fairness hearings on theories of liability that he thought had been neglected. It was a very formidable attack. I heard not a word about attorneys' fees.

[115] So these parties were involved to say they are not in front of the Court on jurisdictional issues, that lawyers who are practicing in a Court have filed MDL cases are not properly before the Court as to attorney fee matters. I don't think much of that, and I don't think the law thinks much of it.

So what about the release issue that you are concerned about? Here is the story, I think, your Honor. There is no significant disparity in terms of any prejudice to any particular number of clients. Mr. Arceneaux, I think, made an embarrassing mistake when he first told the Court that it didn't let people know that all viruses were being released. I would like to read it.

"The settlement class is defined as persons who are HIV infected including those HIV infected persons who are or were also infected with hepatitis or any other infectious agents allegedly transmitted by factor concentrate."

THE COURT: Now, that is in the notice?

MR. SHRAGER: That is right in the notice. I mean, that is bull's eye.

That is an embarrassment not to know that and to say that the release was misleading on that. But I take that to have been inadvertence.

Now, the question—the other question was the United States government. That is true. I believe the government after the fact said we want to release it. We are going to get [116] rid of our claim. We want two things. We want some money and we want a release. I believe there are two cases in the United States. We have spoken to counsel in one or both of them. Jim Green has spoken to both the lawyers. None of them are clients, to the very best of my knowledge, of Tom Mull's. None of them have claims. I didn't hear a representation of claims against the government. I heard a representation there were claims against the state of Louisiana perhaps.

Well, that has nothing to do with it. What are the real life illustrations of claims against clients that will be prejudiced under the terms of the release? Is the release too long, et cetera? Yes. It was obvious what was intended here. The defendants wanted to be protected. They wanted bullet proof protection. So they drew a release quite long, some might say detailed.

But the question before the house is not whether that is the case; the question is whether we jeopardize the rights of thousands of people who will be uncertain. We have explained on our 800 calls hundreds of times weekly —we are at it day and night, I assure you—we explain what the release means and what it doesn't.

Mr. Arceneaux says that, well, these people are calling and they are confused. There is an 800 number. That is what we are there for, and we answer—you know, we answer these calls all the time.

[117] What are they telling you? They say that what has been done here is—it is kind of a cafeteria approach.

So what the defendants have done, according to the argument, is this. For those who want to accept the settlement, there is an irrevocable offer. You get yourself 100,000. You get 100,000, and then we are going after you for our fees, $50,000 apiece.

THE COURT: How does it get to be $50,000, by the way? I am not sure I understand.

MR. SHRAGER: Well, the claim made by Mr. Arceneaux I believe to be $50,000 per case. On the premise that the total settlement would have been 150,000, a one-third fee would be 50, and the client would get a hundred.

Part of the cafeteria is this fee fund. You might be interested in knowing that Mr.—

MR. MAGAZINER: Mr. Arceneaux's claim is he has—Mr. Mull has a one-third contingent fee. And, therefore, in order to pay him one-third where you pay the client two-thirds—you say if two-thirds equals 100,000, what is one-third? That is another 50.

Mr. Spece's claim is for 66,000, as we understand it, because he does the same calculation on a 40 percent basis.

MR. ARCENEAUX: May I be allowed to say what my own claim is?

THE COURT: Yes.

MR. ARCENEAUX: My claim is by offering to the client [118] $100,000 net, you have in fact paid 150,000 because—it is not my claim. It is Lazlo v. State Farm Insurance Company, U.S. 5th Circuit 1986.

THE COURT: Thank you.

MR. SHRAGER: That is final.

Mr. Arceneaux is more reasonable in his contingency arrangements, but be that as it may, what is going on here is perfectly evident. What is going on here is no longer, your Honor, the community.

You remember these same folks came in on behalf of members of the community. The members of the community aren't here today. The lawyers are here. The lawyers are here about fees. And so they proceed with commendable candor, and they have already received, as I don't know if the Court is aware—from this cafeteria arrangement, they have already gotten costs back from the fee fund.

In other words, there is about $75-$80,000 in costs that Mr. Arceneaux has agreed to for—on costs on class action settlements. And they will continue to participate in the fund. So I don't know what their position is except if you don't like the settlement, you can sue them. If you do like the settlement, you can take it.

But we are in a Court of law. There was an order entered. There is a certified class, something called a certified class. It was never appealed. That is what people [119] are relying on out there.

THE COURT: What is your view of that provision in the release that says in substance that we are making our own independent determination here and we are not relying on the fairness finding?

MR. SHRAGER: My view of it is it is unnecessary. It shouldn't be in there. There is a bar order in place. If the fractionators need any further aid and comfort, to be sure, they enjoin the benefits of a bar order. I think they have it already from the Court's May 8th order. If they need more, fine. We understand what the deal was.

THE COURT: This was, as Mr. Spece acknowledges in one of his briefs, a hedge against Amchem, I guess.

MR. SHRAGER: That is exactly right.

I don't think it was necessary, but it was intuitive, and major corporations, you know, want to protect themselves from any contingency. So I think that is all that it was about. It was an effort to create a further layer of protection.

THE COURT: I want a response from the fractionators to the argument that that indicates that you really weren't proceeding with a class settlement.

MR. SMITH: Your Honor, I would point you to page 6 of the fractionators' combined reply that we filed I guess it appears on the 10th of November. What we explained there was [120] that this language simply was to protect us from a claimant signing the release, accepting the idea that there is a Walker class, spending the money, and then coming back and saying there isn't a Walker class.

What this language does is require the clamants to collect now. They can say, if they choose. I have read the Amchem decision. I don't think there is any longer a certified class. I am not going to sign your release, and I am going to bring a lawsuit.

We have told them if you do that, we will assert the bar order in that lawsuit. But we wanted to make clear that they cannot have it both ways. They cannot argue the invalidity of the lawsuit after they have taken our money and spent it.

THE COURT: What was the date of that Mull letter that you quoted, Mr. Shrager, a moment ago?

MR. SHRAGER: Yes, your Honor. I will be happy to—

MS. GOURLEY: March 5th.

THE COURT: March 5.

MR. SHRAGER: I would be happy to make it an exhibit. I assume we are going to be entitled to—

THE COURT: I think that ought to be an exhibit of—it should be part of somebody's recitation today.

MR. SHRAGER: I am assuming, your Honor, that we are going to be permitted to do that.

[121] THE COURT: As far as I am concerned, everything that has been submitted to the Court in connection

with the settlement is an approprite exhibit to today's hearing.

MR. SHRAGER: And just because someone could be looking at the record, in this submission, I see there was an affidavit. There was an affidavit—one of the exhibits—I have not yet received it, but Mr. Green showed me his copy—an affidavit of Mr. Mull which offers what perhaps all those except he and perhaps Mr. Kozak might see as a totally revisionist view of what the settlement was about, the history of the settlement, how it came into being.

There are massive misstatements made, and I am very concerned that because there has not been an opportunity to answer any of this yet, that affidavits have become part of the record.

Your Honor has not seen these papers yet evidently.

THE COURT: No, not if they are part of Mr. Arceneaux's latest filing.

MR. SHRAGER: Well, they are, sir. I just want you to understand that the recitation, the history of the settlement by Mr. Arceneaux and separately by Mr. Mull in an affidavit, somewhat inconsistent with Mr. Arceneaux's recitation, these are simply unilateral statements that they are making about the history of this. And we think in part they show a disregard to the oath. At least Mr. Mull's affidavit does. I just want you [122] to be aware of that, sir.

THE COURT: In what connection—

MR. SHRAGER: In connection—

THE COURT: —is the history of the settlement thought to be relevant to the pending motion?

MR. SHRAGER: It is not.

THE COURT: I thought by Mr. Arceneaux.

MR. SHRAGER: Well, he will have to answer why he thinks why it is relevant.

THE COURT: Yes.

MR. ARCENEAUX: Explaining the history of the settlement was relevant to explain how the conflict of interest problem was exploited by the defendants in crafting a settlement which approached—which was offered to Mr. Shrager when negotiations were ongoing with Mr. Mull who actually had clients. And the offer was made to Mr. Shrager, who had gone on record as saying he represented no clients except MDL plaintiffs.

That was the purpose of demonstrating that the negotiations were going forward with Mr. Mull and progressing satisfactorily.

At some point when the final offer was made, it was not made to Mr. Mull. I think—instead, it was made in the Wall Street Journal.

MR. SHRAGER: Yes.

[123] MR. ARCENEAUX: That was the context.

MR. SHRAGER: You are absolutely correct.

Your Honor, you will see, because Mr. Arceneaux—because Mr. Arceneaux did not participate in the events, he will not recall that your Honor directed me to send a letter, and which I enthusiastically wanted to send to people in order that they not rely on the continued tolling effect.

You will recall the time when there was decertification and there was an issue arose with respect to certiorari. My first step was to notify the outreach group that we had established to let them know that they must not rely on the class any longer as a tolling device and to seek counsel, which was, of course, what professionally we had to do, and the Court thought it was the right thing to do at the time. So I am not sure I know what that has to do with it, with anything.

But what I am concerned about in this history is that it reflects a pattern of conduct by Mr. Mull and his colleagues in operating behind the backs of the Steering Com-

mittee to discuss a settlement at a point in time when there were ongoing discussions with one of the major fractionators which financially would have redounded to greater benefit.

That is just a piece of history. But however we got there, there was a settlement offer made, and though it was in improper form initially, it was refined, it was negotiated, it [124] was accepted. There was a complaint filed. There was an agreement drafted. This Court has worked selflessly, as have many lawyers, in overseeing its implementation. And to trash it at this point would simply be the wrong thing to do.

I want to call your attention that in the papers filed by Mr. Arceneaux, he says that the end result of the present proceedings is, quote, that the settlement is plodding along toward finality but outside the jurisdiction of the Court. I regard these papers as being offensive.

And to have been part of a settlement and to claim thousands of hours of time, as Mr. Mull does. and to then come in and repudiate it and to say it is being repudiated because of a Supreme Court decision, and we knew about it and we ensnared them, we knew what may come down from the Supreme Court, and it did come down. we fooled them, we tricked them, we got you, and now you are stuck, it just doesn't sound right.

THE COURT: Thank you. All right.

MR. ARCENEAUX: One thing I have to get clear today.

THE COURT: Okay.

MR. ARCENEAUX: I have five short comments I would like to make about class counsel's remarks, but I really need to attend to this first because this is the business that I am really here for.

Mr. Shrager said members of the community are not here. That is not true. There was a motion filed by me on

[125] behalf of the Mull & Mull clients asking that the Court order the defendants to not withhold payment from Mull & Mull clients because of the fee dispute. That is the number one order of business. We must take care of that issue before we go any further.

I believe I understand your Honor to say you disagree with my position on that and you won't order them to do so. What I need—

THE COURT: Let me say this.

MR. ARCENEAUX: —is a statement on the record that they are not going to pay us, so I can go somewhere, to a state court, and get an injunction order or something, but I have got to get an order that I can either appeal or that I can take elsewhere.

If your Honor denies the request, that may give me an order to go to the Seventh Circuit for review, but I need to make sure these clients are protected, and I can't allow the defendants to continue to let us twist in the wind. There is a history there. I wrote them a letter saying you are not paying Mr. Spece's clients or you are going to not pay us. Please respond within 10 days or I assume you are not going to pay us. I got no response.

THE COURT: Here, I am going to save you some trouble, and maybe you will save us some trouble by appealing this order to the Seventh Circuit because that would put the fat in the [126] fire even earlier than an appeal from whatever order I enter at the end of the day here.

But I will include in today's order a provision that the fractionators are relieved from paying further settlement amounts to the clients of Mull, Kozak and Spece and Ibanez until futher order of Court.

Now, let me ask this in that connection. To what extent do the fractionators still have control over what payments are made and to whom?

MR. SMITH: Your Honor, first, I am not sure whether Mr. Kozak has in fact asserted a lien. I think we ought to clarify that.

THE COURT: All right. Somehow I always consider him as being part of the same—

MR. SMITH: I think there may be confusion on that, and I ought to clarify it.

THE COURT: I didn't even see Mr. Kozak until just this moment when he stood up.

Are you asserting any kind of a claim for attorneys' fees, Mr. Kozak?

MR. KOZAK: Mr. Arceneaux represents me also, your Honor.

THE COURT: I see.

MR. ARCENEAUX: A lien was filed by Mull & Mull because the contracts are Mull & Mull contracts. Mr. Kozak and [127] Mr. Mull have a fee sharing arrangement as co-counsel.

THE COURT: I see.

MR. ARCENEAUX: The majority of the contracts are Mull & Mull contracts. There are a few with Mr. Kozak's name on them. They are not signed by Mr. Kozak. So that is why the lien was filed by Mull & Mull.

MR. SHRAGER: Your Honor, in the form of order you enter, there could be—you meant in cases in which liens have been asserted, and I think in the—

You said—you made a statement that could be interpreted as meaning across the board, that you didn't wish payments to be made. I would object to that.

THE COURT: Well, I don't even know that the thing is limited to liens because, as I understand the argument, there are all sorts of theories. There are contract theories, there are tort theories.

MS. GOURLEY: We have been sued actually, your Honor.

MR. MAGAZINER: Mr. Arceneaux has informed us that he has sued us, the theory being that when we pay a client, if we do not pay Mr. Mull $50,000, we are acting tortiously.

So I think your Honor is correct that the order should be as to allow Mr. Mull's clients, Mr. Spece's clients, and, based on what Mr. Arceneaux said, Mr. Kozak's clients.

MR. SHRAGER: I would like to—

If I may inquire, how do we know that in a hundred [128] percent of the cases of persons who are represented by Mr. Spece or Miss Ibanez or Mr. Kozak or Mr. Mull that there have been legal claims asserted against—

THE COURT: Well, even if there haven't been to date on the basis of the presentation made today, it might be done tomorrow or next week.

MS. GOURLEY: Your Honor, may we propose a form of order on this? My concern is that the money paid in trust—we really don't. I am not sure how this order should be crafted.

THE COURT: I am not either. That is why I asked who has control of the payment.

MR. SMITH: Your Honor, under the trust agreement, once settlement counsel believes that a release is complete, the fractionators have a five-day period within which they can review the release.

And under the trust agreement, if they do not believe that the release is proper, they can tell that to the settlement counsel, in that case, the payment has been deferred. It has been on that basis that we have been deferring the payments to Mr. Spece's clients on the ground that the release that we bargained for was for peace, not only as to claims for damages, but also peace as to claims for attorneys' fees. We aren't getting that. Since we are not getting that, we are not paying.

[129] MR. ARCENEAUX: I think we ought to include the trust agreement in the record for the benefit of the Court of Appeals because I have never seen it. I don't have a copy.

THE COURT: You are getting it as far as the clients are concerned, aren't you? I mean, there is no claim by any client here that it—

MS. GOURLEY: That's not true, your Honor. The lawsuit filed by Mr. Arceneaux in St. Taminy Parish yesterday, which we got because it is an exhibit to his complaint, names a class member as a plaintiff who alleges emotional distress.

MR. ARCENEAUX: Might I explain who that is?

MS. GOURLEY: It requests punitive damages on behalf of the class member and on behalf of Mull & Mull based on my quick math.

MR. ARCENEAUX: May I explain to you about class members?

Your Honor may recall getting a call from Mary Harper. She notified you that her judge—the courthouse was named after him in St. Louis. She is the woman who—

THE COURT: Let me just say I don't take calls from anybody, but my secretary gets all kinds of calls. So I don't recall that call.

MR. ARCENEAUX: She was the woman who called —who the settlement administrator told her that in order to get her money, she had to fire Mull & Mull. That was the only way she [130] was going to get her check. That was an incident that occurred—when did that occur, Fran? In August.

THE COURT: Who told her that?

MR. ARCENEAUX: The settlement administrator.

MS. GOURLEY: I read that allegation to Mr. Higgins last night who said it was another falsehood.

MR. ARCENEAUX: We will try that in the appropriate Court and see what the facts prove. But that is the basis of why that class member joined that suit.

THE COURT: What is your suggestion, Miss Gourley, about an order?

MS. GOURLEY: What I would like to do, your Honor, is submit a form of order to the plaintiffs and to the Court and—

THE COURT: All right.

MR. SHRAGER: That would be better, I think, if you don't mind.

MR. ARCENEAUX: Could we ask that that be done within—

THE COURT: Yes.

MR. ARCENEAUX: We need to have certainty on these issues.

THE COURT: Try to do it by the end of the week.

MS. GOURLEY: Absolutely, your Honor.

MR. ARCENEAUX: Will your Honor agree to make the trust agreement a part of the record? I think it is important.

[131] THE COURT: I will make anything part of the record that anybody wants.

MR. ARCENEAUX: In order for me to do that, I need a copy.

MS. GOURLEY: After we get through, we would be happy.

MR. ARCENEAUX: That will be in a few minutes because I told you at the end of the hearing I would give you my copy.

MS. GOURLEY: Thank you.

MR. ARCENEAUX: So who would be responsible?

(Brief interruption.)

MR. ARCENEAUX: Now, on the other points raised, that was the major mission for me to accomplish today, and I think at least we have something on the record so now we know where we stand.

THE COURT: Before you proceed any further, Mr. Arceneaux, I am somewhat puzzled by a statement you made a moment ago.

You have submitted to the jurisdiction of this Court, you, Mr. Mull, Mr. Kozak, Mr. Spece, Miss Ibanez, to adjudicate a motion that you have filed having to do with this whole question of attorneys' fees. And I am going to rule on that motion, and I am going to rule on the competing motion of the fractionators.

Now, I think I heard you say that if you are dissatisfied with a ruling I make, you are going to go to some [132] other Court and seek relief.

MR. ARCENEAUX: I am sorry if I misinformed you. That's not our position at all.

Our position is this, and this is what is argued in the papers. A summary of the argument I think is what puts it forth most clearly. Our position is this Court has jurisdiction over two things: A $600 million fund that it can hold in its res—that it can hold under its auspices to make available to settlements who sign—to claimants who sign that release and get their settlements.

It also has jurisdiction over a $40 million fund. It may be called a cost and fee fund. It may just be $40 million sitting in a bank account that is no longer a cost and fee fund, but it is $40 million. It is a res, and it is in the jurisdiction of the Court.

In our response to the defendants' motion, we made a special limited appearance. We preserved—

THE COURT: There is no such thing in the federal court.

MR. ARCENEAUX: Well, the Graff case cited in our brief in the Seventh Circuit seems to indicate otherwise, an in rem proceeding. We can appear in an in rem proceeding when the only jurisdiction the Court has is over a fund and we can assert our right to the fund and the Court can adjudicate our right as to the fund.

[133] But what the Court doesn't have jurisdiction over is the rights that we may have outside of the fund. So what that means is your Honor is fully clothed with the authority to adjudicate our rights as to the $40 million. And that is not what the fractionators have asked you to do. They have not contested our right to share in the 40 million.

What they have asked you to do is enter a ruling adjudicating our rights outside of the $40 million, and that is what we believe your Honor doesn't have either the personal or the subject matter jurisdiction to do. So I realize there is a—it is a fine distinction, but it is clearly recognized.

THE COURT: The issue that you have presented to me for decision is whether you have a right to go outside the $40 million.

MR. ARCENEAUX: They presented the issue.

THE COURT: No, you have presented the issue because what you have said is there is no valid limitation upon our right to assert our rights under our contingent fee contracts.

Now, in order for you to reach that conclusion or for me to reach that conclusion, I would have to hold that you are not limited to the $40 million fund.

MR. ARCENEAUX: All you have to hold is that you have no jurisdiction to adjudicate that.

THE COURT: Just let me tell you that whatever order I enter that may be unfavorable to you is quite likely to [134] preclude any further litigation of the ques-

tion of whether the fractionators can be held liable for more attorneys' fees on any theory whatsoever, contract—

MR. ARCENEAUX: Tort, unjust enrichment.

THE COURT: —tort or other theory you are thinking of asserting in some other Court.

You can't come in here and take a small bite and reserve the rest of the meal for some other venue.

MR. ARCENEAUX: I understand. I only want to point out for your Honor that we did not take the bite. They hauled us in here on this motion, and I am only appearing by way of defense. We did not—we did not come into this Court and affirmatively invoke its powers to get relief.

THE COURT: I don't know the sequence of who filed what.

MR. SPECE: Your Honor, on this point I just want to make clear, we have tendered—Rose Ibanez and Roy Spece have tendered jurisdiction, whether it exists or not. We have requested this Court to take jurisdiction, give us discovery on all of our theories, but we would feel that any adjudication without discovery and a hearing would be a gross denial of due process of law.

THE COURT: Okay.

MR. ARCENEAUX: That is the only other point I want to make. I agree with that totally.

[135] There seems to be a lot of discussion about whether the representations of fact I made are true and the affidavits are accurate. I think if those issues are important to your Honor, then it is appropriate to grant Mr. Spece's request and that at some point we may have to have an evidentiary hearing to resolve any factual disputes.

In that regard, here is the March 5th letter. I will be happy to make a copy of the letter because I don't think there is anything—

THE COURT: I am sure I have one in chambers because it is among those.

Is the March 5 letter—did that go to everybody or was that part of the exchange?

MR. MAGAZINER: That was a letter to your Honor.

MR. ARCENEAUX: It wasn't submitted to the defendants.

MR. MAGAZINER: Your Honor, to be absolutely clear in response to what Mr. Arceneaux has just said, it is not the fractionators' position that your Honor needs to—that the factual matters we wish to place in the record in response to the things that Mr. Arceneaux and Mr. Spece have said are necessary to your Honor's decision. We agree with what Mr. Shrager said.

Your Honor can decide these issues, whether there is a valid lien, whether there are claims for money beyond the $40 million without regard to any of the facts that Mr. Arceneaux [136] has thought necessary to put in his brief, Mr. Mull has put in his affidavit, or that have been spoken in Court.

We just would like in fairness an opportunity to correct the record in that regard, but we think your Honor can make a ruling without relying on those factual representations one way or the other, and I believe I speak for Mr. Shrager in that regard as well.

THE COURT: All right, Court stands in recess.

(Which were all the proceedings had in the above entitled cause on the day and date aforesaid.)

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MDL-986

No. 93 C 7452

IN RE FACTOR VIII OR IX
CONCENTRATE BLOOD PRODUCTS LITIGATION

Cases No. 94 C 2655
94 C 2727
94 C 2728
94 C 5975
94 C 5815

JOHN DOE AND JANE DOE
JANE DOE
JANE DOE AND JOHN JOE,
JANE DOE,
T. DOE,

Plaintiffs,

v.

MILES INC., *et al.*,

Defendants.

CERTAIN ARIZONA PLAINTIFFS' RESPONSE TO MOTION FOR PRELIMINARY FAIRNESS FINDING AND REQUEST FOR THREE BUSINESS DAY EXTENSION TO ALLOW MORE COMPLETE RESPONSE

Certain Arizona Plaintiffs represented by the undersigned counsel in both state and federal cases hereby respond to the pending Motion for Preliminary Fairness Finding and request that the Court allow three additional business days (i.e., until August 19, 1996) for further response.

These Plaintiffs understand and appreciate that: (1) all parties have been working feverishly to achieve a global settlement; and (2) their counsel have been kept abreast of developments. However, as of this moment, neither these plaintiffs nor their counsel have seen either a final version of the proposed settlement or a final version of the proposed class notice. Although plaintiffs' MDL lead counsel graciously offered to share these in Chicago the evening prior to the August 14, 1996, hearing, the mere prospect of viewing the documents at such a late time does not justify another trip to Chicago in the midst of plaintiffs' counsels' virtual daily deposition schedule and discovery schedule in the Arizona state court hemophilia/HIV/AIDS cases.

In the event that the Court is not willing to entertain any delay (even when such delay might moot comments below by undersigned counsel), these plaintiffs wish to place on the record that the settlement agreement and notice drafts they have seen or been informed about are unfair in that they do not provide for or contain the short reference to the Arizona class litigation described in Exhibit "A" hereto (which is a copy of the Motion for Reconsideration, or Alternatively, Motion for Order Di-

recting Notice To Potential Plaintiffs in Arizona) or otherwise apprise Arizona victims that they have substantial potentail claims against health care provider defendants.

Moreover, plaintiffs wish to lodge an objection to the defendants' probably unethical, in effect, stipulation to the amount of costs and fees, thereby potentially driving a wedge between filed and unfiled cases and certain victims and their attorneys. Plaintiffs waive this objection, but note that the proposed settlement can ultimately be found fairly only if: (1) all legitimate costs, which by Arizona law must be paid by the clients, are awarded; and (2) the Court assures that the probable burden of inadequate fees is spread evenly among all the attorneys based on certain criteria commonly applied in attorneys' fees adjudications, including the honoring when possible, of contracts between counsel and clients in state court litigation.

Finally, the plaintiffs make explicit that: (1) they oppose any injunctions on cases in which the plaintiffs and their attorneys immediately opt-out or announce they will opt-out the moment a settlement class is certified (and denying that the Court has the power to issue any injunction in state court cases); and (2) they have been assured that no such injunctions will be sought.

RESPECTFULLY SUBMITTED this 13th day of August, 1996.

/s/ Rose Marie Ibáñez
ROSE MARIE IBANEZ